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No. 06-668

In the Supreme Court of the United States

THOMAS M. COOLEY LAW SCHOOL,
Petitioner,

v.

THE AMERICAN BAR ASSOCIATION, and JOHN SEBERT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. When the Department of Education delegates to a private entity, such as the American Bar Association, authority to accredit institutions of higher learning, should an accreditation decision by that private entity be subject to a lower, more limited and deferential standard of judicial review than would be the case if the Department itself directly made the accrediting decision?

2. Does the Higher Education Act, 20 U.S.C. §1099b, which preempts institutions of higher learning from bringing actions regarding accreditation in state courts, provide a private right of action in federal court to an institution of higher learning against an accrediting agency for the denial, withdrawal, or termination of accreditation or failure to comply with the requirements of the Act?

Statement Pursuant to Supreme Court Rule 29.6

Petitioner Thomas M. Cooley Law School is a Michigan nonprofit educational corporation. It has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit dated August 16, 2006 affirming the decision of the District Court is officially reported at 459 F.3d 705 and is reproduced in App. A at 1a.

The decision of the United States District Court for the Western District of Michigan dated June 9, 2005 is officially reported at 376 F. Supp. 2d 758 and is reproduced in App. B at 22a.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered August 16, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutes at Issue

The relevant statutory provisions are §1099b of the Higher Education Act, 20 U.S.C. §1001 *et seq.* and § 706 of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, which are reproduced in App. C and App. D, respectively.

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 20 U.S.C. § 1099b(f) (adverse accreditation

decision). Petitioner filed this action to challenge certain adverse accreditation decisions based on violations of the Higher Education Act ("HEA") and federal common law due process. Accreditation is of critical importance to a law school and every other institution of higher learning. The Department of Education does not directly exercise the power delegated by Congress under the HEA to accredit law schools and other institutions of higher learning. Instead, the Department sub-delegates accrediting authority to private entities, such as the American Bar Association ("ABA") in the case of law schools. Thomas M. Cooley Law School ("Cooley"), whose main campus is located in Lansing, Michigan, was founded in 1972, and has been accredited by the ABA since 1975.

The ABA's accreditation decision making authority rests with the ABA's Council of the Section of Legal Education and Admissions to the Bar ("Council"). The ABA makes all of its accreditation decisions through the following process. As the first step towards accreditation, a law school submits a voluminous application consisting of hundreds of pages of data as directed by the ABA's Rules, Standards and Procedures. After receiving a school's accreditation application, the ABA handpicks a "site evaluation" team to visit the school to collect the facts on which the accreditation decision will be based. The school does not have a right to select members of the site evaluation team. The site evaluation team is the only firsthand fact-finder in the entire ABA process. This team of fact-finders travels to the applicant school, interviews faculty, staff, and students, observes actual classes, inspects the library and other resources, and examines the entire physical plant. The team then prepares a report enumerating the facts found. The report is directed to the Accreditation Committee of the Section of Legal Education and Admissions to the Bar

("Accreditation Committee"). ABA Rule 3(a) states: ". . . the Accreditation Committee shall meet to assess approval based upon a record consisting of the law school's application, the site evaluation report, any written material submitted in a timely manner by the school, and other relevant information." The vast majority of the facts used by the Accreditation Committee are generated by the site evaluation team. After reviewing the factual record submitted to it, the Accreditation Committee makes a recommendation to the Council to approve or deny accreditation. The Council then makes the final decision, again relying on the site evaluation team's fact-finding report.

The accreditation decisions at issue in this case involve Cooley's decision to open two satellite campuses, one at Western Michigan University in Grand Rapids ("Grand Rapids") and the other at Oakland University in Rochester Hills ("Oakland"). Cooley first began considering the operation of satellite campuses in 2001. At that time, Cooley approached the Deputy Consultant to the ABA's Section on Legal Education for guidance and direction. The Deputy Consultant, who is authorized by the ABA to provide law schools direction with respect to the accreditation process, told Cooley to structure its application based on newly-drafted interpretations of Standard 105 governing satellite campuses even though the interpretations had not yet been formally adopted by the ABA House of Delegates. Cooley then submitted, in June 2002, the application for approval of its Oakland satellite campus based upon the new interpretations, which were less onerous and demanding than the existing interpretations. The very next month, the ABA sent its own handpicked site evaluation team to review the Oakland campus. The site evaluation team itself was instructed by the ABA to apply and did in fact apply the new interpretations during its visit to the Oakland campus. The ABA site

evaluation team's fact-finding established that Cooley's proposed satellite campus program at Oakland met all applicable ABA criteria for accreditation. The site evaluation team unequivocally found that the proposed satellite campus was carefully considered and planned, and would not adversely affect Cooley's main campus in Lansing, Michigan.

Contrary to the ABA's own fact-finding, the Accreditation Committee recommended denial of Cooley's application for accreditation in early 2003. The reasoning cited by the Accreditation Committee was cursory and did not derive from any reasonable connection to the facts--indeed, the Accreditation Committee contradicted the facts--as found by the ABA's own site evaluation team. In addition, the Accreditation Committee analyzed Cooley's applications using the old, more onerous interpretations of Standard 105 rather than the new interpretations Cooley had been told to apply. Similarly, even though the site evaluation team's report established that Cooley met the criteria of the new interpretations of Standard 105, the Council denied Cooley's application based on the old, more onerous interpretations. The very next day, the ABA formally approved and adopted the new, less demanding interpretations pertaining to satellite campuses.

It is hard to imagine a more arbitrary and unfair process than one in which a regulatory authority tells an applicant to abide by a new set of rules, tells its own fact-finders to apply the new set of rules when evaluating the applicant, rejects the applicant based on the old rules because the new rules were not "formally" adopted, and then adopts the new rules the very next day after rejecting the applicant based on the old rules.

Immediately following this byzantine bureaucratic experience, Cooley attempted, in February 2003, to operate its satellite programs under a different ABA Rule, Rule 19(d). At the time Rule 19(d) provided:

> An approved law school must inform the Consultant prior to implementing any proposed major structural change(s) so that a site evaluation visit may be promptly scheduled. In the event that the major change in organizational structure is the opening of a branch or an additional location, the site evaluation visit **shall take place within six months of the start of classes** at the branch or additional location.

(Emphasis added).

Cooley quite reasonably interpreted this rule to mean that a school was permitted to implement a major program change upon notice to the Consultant, subject to a subsequent site evaluation visit within six months to determine compliance. As an added precaution, when Cooley notified the ABA that it would be operating the satellite programs under Rule 19(d), subject to the site evaluation visit the Rule required, Cooley specifically requested a definitive ABA interpretation of Rule 19(d) in order to verify that Cooley's interpretation was correct. Representatives of the Council first responded by saying Cooley's interpretation was erroneous and later that the interpretation of Rule 19(d) was a matter solely for the Council, all without ever providing a definitive interpretation to Cooley. The Accreditation Committee then discussed Cooley's interpretation of Rule 19(d) at a private retreat held in October 2003. Even though Cooley was not allowed to attend or submit evidence, the Accreditation Committee found

that Cooley's interpretation of Rule 19(d) and its operation of satellite campuses thereunder was a violation of various ABA rules and regulations.

In November 2003, the ABA notified Cooley to show cause why it should not be sanctioned under ABA Rule 13 for operating the satellite programs. Cooley provided voluminous evidence demonstrating that it was in full compliance with all applicable ABA regulations and should not be subject to any sanctions. Cooley's requests to cross-examine witnesses were summarily denied. At the time of the show cause hearing, the ABA was in possession of ex parte, extra-evidentiary material from a rival law school, which was not discussed during the open hearing, and was not made known to Cooley until after the ABA announced its decision to sanction Cooley under ABA Rule 13.

The Rule 13 issue is an especially egregious example of arbitrary and irrational decision making. The plain language of Rule 13(d) required the Accreditation Committee and the Council to determine, prior to imposing sanctions, "whether the law school is in compliance with the Standards." (Emphasis added). In other words, sanctions could not be imposed on Cooley, under the unambiguous language of the ABA's own rules, if Cooley was in compliance at the time of the show cause hearing. There is no dispute that Cooley was in compliance at the time of the show cause hearing. Nevertheless, the Council imposed sanctions contrary to the explicit language in its own rules. As Circuit Judge Batchelder noted in her concurrence below:

> The ABA's use of "is" in the flush language of Rule 13(d) required it to make a present-tense determination of compliance. Therefore, the latter courses of action [sanctions] were

> permitted only if the Committee found that the school was not in compliance at the time of the hearing. In my view any other interpretation of the rule turns grammar on its head . . .Under Rule 13(d), the Council was not permitted to sanction Cooley unless Cooley was not in compliance with ABA standards at the time of the show cause hearing.[1]

For the two judge majority in the Sixth Circuit, the "flush" language and clear "grammar" of Rule 13(d) did not pose a problem. The majority did not hesitate to agree with the ABA's argument that Rule 13 cannot be given its literal interpretation. This holding by the majority is astonishing. No federal court would permit an administrative agency, as opposed to the ABA, to ignore the plain language of its own rules and, instead, apply a non-literal interpretation. As evidenced by other events in recent American history, few assertions are more nonsensical and irrational than: "Is does not mean is."

Procedurally, the district court dismissed Cooley's HEA claim, concluding that the Act did not grant a private right of action to enforce its provisions.[2] The district court, without permitting discovery, also dismissed Cooley's due process claims, concluding that the ABA had provided the minimal process required by the appropriate standard of review. The Sixth Circuit affirmed, agreeing that the HEA does not

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[1] *Thomas M. Cooley Law School v. American Bar Ass'n*, 459 F.3d 705, 716 (6th Cir. 2006) (Batchelder, J., concurring).

[2] *Thomas M. Cooley Law School v. American Bar Ass'n*, 376 F. Supp. 2d 758 (W.D. Mich. 2005), *aff'd*, 459 F.3d 705 (6th Cir. 2006).

provide a private cause of action and--applying a limited, deferential standard of review--that "the ABA followed a fair procedure in reaching its conclusions."[3]

Reasons for the Granting of the Writ

Federal courts have exclusive jurisdiction to review decisions concerning the accreditation of higher educational institutions pursuant to the HEA. The criteria federal courts should apply in conducting this review raise an issue of national significance and wide-ranging importance. Accreditation decisions are of the utmost importance to both students and institutions of higher learning. Accreditation decisions affect thousands of schools, millions of students, and involve billions of dollars annually. For example, students at unaccredited schools cannot participate in federal educational loan programs. With respect to law schools, the decisions also directly control the ability of students to sit for state bar examinations and constrain the ability of Cooley and other law schools to recruit and attract new students.

Although immensely important to the public, the accreditation decisions of the ABA and similar private entities receive little or no meaningful judicial review. These private accrediting entities are not accountable to the public and are able to operate above the law because the federal courts have applied--without any input or guidance from this Court--a lower, more limited and deferential standard of judicial review to private decision making than they would apply if the delegating administrative agency itself had made the accrediting decision.

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[3] 459 F.3d at 713.

A. Private Accrediting Entities Should Not Be Subject to a Lower, Less Stringent Standard of Judicial Review Than the Administrative Agency That Delegated the Accreditation Authority To Them.

As a result of the sub-delegation of accrediting authority from the Department of Education, the ABA performs a vital public function as the sole regulator of law schools and law students. The ABA has the power, literally, to decide what law schools may exist, how they should operate, and who may become a lawyer. Yet, as a private corporation of practicing lawyers, organized under the laws of Illinois, the ABA is not accountable to the public in any way whatsoever. Consequently, its accreditation decision making is shrouded in secrecy and governed by constantly changing and inconsistently applied rules and standards. Private accrediting entities like the ABA are unfettered by traditional notions of due process and the rule of law. The ABA governs law schools omnipotently as the sole legislator of standards for law schools, sole investigator, sole judge of a law school's compliance, and sole punisher of non-compliance.

The only effective check on the power of private accrediting entities like the ABA, the only way to protect the public, is through the exclusive jurisdiction of the federal courts to review accreditation decision making. Unfortunately, there has evolved in the federal courts a federal common law standard of review that is mostly meaningless because it is a lower, more limited standard of review than applies to administrative agency decision making. The standard that has evolved in the lower federal courts gives rise to an intolerable anomaly: the decision making by an administrative agency is subject to a standard of judicial review that is designed to assure "reasoned decision

making,"[4] yet when that agency sub-delegates accreditation authority to a private entity, the private entity's decision making is subject to a more deferential and limited review designed to assure only that the private entity "followed a fair procedure" as opposed to using "reasoned decision making." The Sixth Circuit articulated this lower, more limited standard as follows:

> This standard of review resembles the review applied under the Act. *See* 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). We emphasize, however, that while principles of federal administrative law provide guidance in our analysis, **judicial review of accreditation decisions is more limited than review under the Act**. Although accrediting agencies perform a quasi-governmental function, they are still private organizations. **Courts have made the policy decision to ensure that these organizations act in the public interest and do not abuse their power, but judicial review is limited to protecting the public interest.** Recognizing that "the standards of accreditation are not guides for the layman but for professionals in the field of education," **great deference should be afforded the substantive rules of these bodies and courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching**

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[4] *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

> **its conclusions**. We are not free to conduct a *de novo* review or substitute our judgment for that of the ABA or its Council. Rather, in analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable, we focus on whether the agency "conform[ed] its actions to fundamental principles of fairness."[5]

As the Sixth Circuit noted, this limited standard of review is the result of a "policy decision" made by district and circuit courts. The policy of limited, deferential review evolved out of federal common law of the last seventy years as courts attempted to balance the need "to ensure that these organizations act in the public interest and do not abuse their power"[6] against the fact that "they are still private organizations"[7] and, therefore, no "judgemade principles or statutes are to be applied to control the actions of [such] private associations."[8] The standard that evolved is highly deferential: whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusion. Under this policy of limited review, a federal court like the Sixth Circuit merely looks to see if a given institution had notice and an opportunity to be heard:

> The district court did, however, address the claims, and in any case, they are meritless. Cooley was afforded ample process at each of

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[5] *Thomas M. Cooley Law School*, 459 F.3d at 713 (emphasis added) (citations omitted).

[6] *Id.*

[7] *Id.*

[8] *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65, 71 (N.D. Ill. 1967).

> the ABA hearings--it was notified well in advance, afforded the opportunity to submit evidence to supports [*sic*] its case, and permitted to appear before the body with counsel present.[9]

It is not an exaggeration to say--and this case is a text-book example--that under this more deferential standard, an irrational decision, divorced from the facts, withstands judicial scrutiny and is not even questioned, let alone set aside, so long as there was notice and an opportunity to be heard.

The policy decision of federal courts to use a limited, deferential standard of review is, arguably, a reasonable and correct decision in cases involving purely private accrediting organizations that have absolutely no affiliation with government, that is, they receive no delegation of accrediting authority from the government. The purely private accrediting organization derives its authority to accredit, not from the government, but from members who voluntarily and willingly submit themselves to the accrediting body. For example, it is appropriate for courts to engage in a limited, deferential review of private accrediting commissions or associations that accredit and regulate a voluntary group of members committed to common aspirations such as "high standards" and "ethical business practices." Indeed, the earliest accreditation cases express an understandable

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[9] 459 F.3d at 715

reluctance to intervene in the affairs of purely private, voluntary accrediting associations.[10]

The ABA and similar quasi-governmental accrediting associations are, of course, very different accrediting organizations. The ABA does not derive its authority to accredit as a result of law schools voluntarily associating with and willingly seeking guidance from it. Law schools do not seek ABA accreditation to engage in self-policing or to attain some type of "good seal of approval." They seek accreditation because it is the only means for them and their students to access important government benefits such as student loans, other programs and licenses. Under the HEA, a school and its students are not eligible to participate in various federal programs unless the school has been accredited in accordance with the Act. The Department of Education has expressly delegated to the ABA the authority to accredit law schools so that they and their students will be eligible to obtain loans and participate in programs under the Act. In accepting this delegation, the ABA acts with the authority and in place of the Department of Education. Similarly, many states do not permit a person to take the bar exam and thereby obtain a license to practice law unless that person is a graduate of an ABA accredited law school.

Under these circumstances, it is not a reasonable or correct policy decision to apply to ABA accrediting decisions a limited, highly deferential standard of review that evolved from and was applied in cases involving the decisions of

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[10] See, e.g., *North Dakota v. North Central Ass'n of Colleges and Secondary Schools*, 99 F.2d 697 (7th Cir. 1938); *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

purely private, voluntary associations. The time has come for the Court to correct this policy mistake of the lower federal courts and hold that the same standard of review applicable to a governmental agency applies to a private entity delegated decision making authority by that agency.

This Court has declared that the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.* ("APA") requires a "scheme of reasoned decision making."[11] An administrative agency must reach its decisions through a process that is logical and rational.[12] Further, this Court has stated that when "on-the-record agency fact-finding" exists under the APA, then the decisions made by the agency must be supported by substantial evidence; in other words, there must be a logical relationship between the facts found and the decision made.[13] "There is no room . . . for deference to an agency's eccentric view of what a reasonable fact-finder ought to demand."[14] These standards apply to the Department of Education in its decision making under the HEA; no less standard should apply to private accrediting agencies who derive their authority entirely from the Department of Education and the HEA.

The current, limited federal common law standard of review is inadequate. It permits irrational decision making to stand without scrutiny. The case *sub judice* is a perfect example of the problem with the limited common law standard of review fashioned by the lower courts. The Sixth

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[11] See *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 373 (1998).

[12] *Id.* at 374.

[13] *Id.* at 377.

[14] *Id.*

Circuit's criteria for review--due process is satisfied if there is notice to a school and the school is afforded an opportunity to be heard--amounts to no review at all. The standard is so low as to be meaningless.

For example, applying the limited standard of review, the Sixth Circuit did not scrutinize or even address the key issue in this case--the ABA's decision to deny accreditation to Cooley's satellites in direct contradiction of the facts as found by the ABA's own site evaluation team. This disconnect between the facts and the decision simply was not reviewed under the limited standard. Under this minimal standard of review, the Sixth Circuit was not troubled that the ABA told Cooley to apply new regulations to its application, told the site evaluation team to apply the new regulations, then rejected the application based on the fact that the old regulations were technically still in effect and then, unbelievably, adopted the new regulations the very next day. Similarly, under a deferential standard of review, the Sixth Circuit did not hesitate to hold that ABA Rule 13, under which Cooley was sanctioned, "cannot be given . . . a literal interpretation."[15]

Under the heightened, more rigorous standard of review applied to administrative agency decision making, all of these Sixth Circuit conclusions would be different. It is axiomatic that when reviewing decisions of an agency, federal courts insist that there be a "rational connection between the decision made and the facts found."[16] Under the heightened standard, courts, including the Sixth Circuit, routinely compare an

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[15] 459 F.3d at 714.

[16] *Cincinnati Bell Tel. Co. v. FCC.*, 69 F.3d 752, 758 (6th Cir. 1995).

agency's decision to the factual record in order to determine the presence or lack of a rational connection between them. Applying the limited, deferential standard *sub judice*, the Sixth Circuit made no such comparison. Similarly, if it had applied a more rigorous standard, the Sixth Circuit would not have tolerated the fact that the ABA required Cooley and its own fact-finders to play by one set of rules, but used a different set of rules in its decision making.[17] Finally, under the standard applicable to administrative agencies, federal courts and especially this Court insist that administrative rules be given their plain, literal meaning,[18] not a meaning fashioned to achieve a particular result.

In order to promote better decision making in an area of great public importance, the Court must weigh in at this point in time to correct the policy error of the lower federal courts in applying the lower, deferential standard of review to accrediting authorities like the ABA.

B. This Court Should Recognize a Private Right of Action Under the HEA So That Institutions of Higher Education Are Not Left Without a Remedy For Wrongful Denial, Withdrawal, or Termination of Accreditation or Failure to Comply With the Requirements of the Act.

HEA, § 1099b expressly provides: "Notwithstanding any other provision of law, any civil action brought by an institution of higher education seeking accreditation . . . involving denial, withdrawal, or termination of accreditation

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[17] *Allentown Mack Sales and Service*, 522 U.S. at 374.

[18] *Id.* at 377 (they "mean what they say").

. . . shall be brought in . . . United States district court."[19] This language by its very terms applies only to institutions of higher education like Cooley and grants them the right to bring a "civil action" in federal court "involving" an adverse accreditation decision by a private accrediting body like the ABA. Yet, in deciding an issue of first impression for any federal court including this Court, the district court and Sixth Circuit below both held that Cooley failed to state a claim under § 1099b of HEA upon which relief can be granted because the HEA does not provide a private right of action.[20] In support, both courts cited lower federal court decisions holding, under other sections of the HEA not expressly mentioning a "civil action" and not expressly applicable to only schools, that there is no private right of action under the Act.[21] In response to Cooley's reliance upon the express language of § 1099b granting the right to a "civil action," the Sixth Circuit labeled such grant merely jurisdictional.[22]

If this language is merely jurisdictional, the phrase "civil action" would be superfluous. Moreover, the lower federal courts have construed this provision as granting exclusive jurisdiction in federal courts for schools aggrieved by the

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[19] 20 U.S.C. § 1099b(f).

[20] 376 F. Supp. 2d at 766; 459 F.3d at 710.

[21] 376 F. Supp. 2d at 769; 459 F.3d at 711. Indeed, not one of the cases relied upon below for the proposition that "nearly every court to consider the issue in the last twenty-five years has determined that there is no express or implied right of action to enforce any of the HEA's provisions" was an action by an institution of higher learning against an accrediting body involving an adverse accreditation decision under § 1099b(f). *See* 459 F.3d at 710 (*quoting McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) and citing other cases).

[22] 459 F.3d at 711.

adverse accreditation decisions of accrediting bodies such as the ABA that are approved by the Secretary of Education. It is inconceivable that in § 1099b(f) Congress expressly granted exclusive federal court jurisdiction over all civil actions by institutions of higher education "involving" adverse accreditation decisions without providing a concomitant right of action to those schools. Taken to its absurd conclusion, this reasoning means that Congress pre-empted all state law claims and remedies of schools without providing them any claim or remedy in federal court even though "the availability of a state law claim is even *more* important in an area where no federal private right of action exists . . . 'it would be difficult to believe that Congress would without comment, remove all means of recourse for those injured by illegal conduct.'"[23] As the Sixth Circuit itself noted below:

> This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by those bodies. It would make little sense for state law to govern claims that could not be heard in any state court. "It is hard enough to be a ventriloquist's dummy in diversity suits under *Erie*; it would be all but impossible to see how federal courts could apply state law to the actions of accrediting agencies when state courts have been silenced by the provision for exclusive jurisdiction. If a grant of federal jurisdiction can justify the creation of federal common law, a grant of exclusive jurisdiction

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[23] *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

> necessarily implies the application of federal law.[24]

As a result, if schools like Cooley do not have a private right of action under the HEA against private accrediting bodies like the ABA, the schools are left without a remedy for wrongful denial of accreditation.

In the case *sub judice*, for example, the ABA imposed sanctions on Cooley and publicized those sanctions, thereby damaging Cooley's reputation. If, as the evidence demonstrates, the ABA's accreditation denials were improper, the sanctions and resulting damage to Cooley were also improper, but Cooley is left without a remedy against the ABA. Indeed, without this Court giving effect to the private right of action expressly contemplated in § 1099b(f), institutions of higher education have no remedy in equity to preclude wrongful accreditation decisions or remedy in law to redress them.

Further, should this Court decide that the ABA and other like quasi-public entities are not held to the same standards and responsibilities of governmental agencies, then the affected institutions of higher education should have a private right of action to enforce the HEA's standards and requirements. As a practical matter, if accrediting bodies like the ABA have the ability to operate in any manner they see fit, knowing that their decisions are effectively unreviewable, then the public interest and welfare will suffer. In that instance, a private right of action is imperative to uphold the goals of the HEA, which are to ensure that institutions of higher education that participate in federal programs are

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[24] 459 F.3d at 712 (citations omitted).

offering quality education to the nation. The quasi-public bodies must have a check on their power to deny or grant accreditation to institutions of higher education; otherwise these bodies have no incentive to promulgate, much less follow, their own rules, or even offer accreditation proceedings that comply with due process.

The two questions presented before this Court are directly related, and answering the first in the negative should require answering the second in the affirmative. Indeed, the Sixth Circuit further found that "[accreditation] disputes can be resolved, not through the HEA, but through a [federal] common law claim for due process and adequate judicial review."[25] If this Court declines review to establish that the APA standard of review applies in federal court to adverse accreditation decisions, then it should accept review to find that aggrieved schools like Cooley have a private right of action under the HEA against the accrediting body for wrongful "denial, withdrawal, or termination of accreditation."

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[25] *Id.* at 711.

Conclusion

These issues of first impression for this Court are matters of national importance and will affect generations to come. As such, the Petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals in this proceeding.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-1891

[Filed August 16, 2006]

THOMAS M. COOLEY LAW SCHOOL,
Plaintiff-Appellant,

v.

THE AMERICAN BAR ASSOCIATION,
JOHN SEBERT,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 04-00221
David W. McKeague, District Judge

Before: SILER, BATCHELDER, and GIBBONS, Circuit Judges

OPINION

JULIA SMITH GIBBONS, Circuit Judge. This case arises from a dispute between the American Bar Association, the national accrediting body for law schools and its Consultant on Legal Education John Sebert (collectively "ABA"), and the Thomas M. Cooley Law School ("Cooley" or "the school"), an accredited law school located in Lansing, Michigan. The dispute centers on Cooley's attempts to begin two satellite programs - one at Oakland University in Rochester ("Oakland campus") and one in Grand Rapids ("Grand Rapids campus"). Cooley claims that the ABA denied Cooley due process in failing to accredit the two proposed satellites and in imposing sanctions on Cooley for operating the satellites without ABA prior acquiescence. The district court denied these claims and granted judgment to the defendants. As we find that the ABA afforded Cooley all due process in making its rulings, we affirm.

I.

The federal government does not directly accredit institutions of higher education. Rather, the Secretary of Education approves accrediting agencies for different types of educational programs, and these accrediting bodies set independent standards for accreditation. Accreditation is important to a school for a number of reasons, not the least of which is that it allows the students of the school to receive federally-backed financial aid. In addition, the majority of states use ABA accreditation to determine whether an individual applying for admission to the Bar has satisfied the state's legal education requirement.

The ABA's Council on the Section of Legal Education ("Council") is the organization charged with accrediting law

schools. The Council makes its decisions following a review and recommendation by the ABA's Accreditation Committee ("Committee"). The process is governed by written Standards, Rules, and Interpretations that are adopted after both public review and comment and review by the ABA House of Delegates ("House"). The Standards describe the requirements that a law school must meet to obtain and retain ABA approval. Standard 105 states: "Before a law school makes a major change in its program of legal education or organizational structure it shall obtain the acquiescence of the Council for the change." The opening of an additional campus falls under Standard 105. Under ABA rules, a school may offer up to 20% of its legal pro gram at a separate campus without this being a "major change" requiring prior approval. If a school offers more than 20% of its program, however, this does constitute a major change and the ABA must grant acquiescence. Under pre-2003 ABA interpretations, any offering beyond the 20% limit was considered to be the opening of a full "branch campus" and was treated as the creation of a new law school. In December 2001, the Council proposed a new interpretation of Standard 105, which would add an intermediate "satellite campus" option. Under the new interpretation, the opening of a satellite would constitute a major change requiring ABA acquiescence but would not be subject to the same heightened review of a full branch campus. The interpretations were not officially adopted until approved by the House in February 2003.

In 2002, Cooley applied to the ABA to open a satellite at the Oakland campus. The school structured its application to be consistent with the proposed interpretations of Standard 105, despite its acknowledgment that the interpretations "remain[ed] pending" and had not been approved. Under either the old or new interpretations, Cooley's proposal constituted a major change that required ABA acquiescence.

While awaiting ABA approval, Cooley began a first-year program at the Oakland campus, which did not require prior acquiescence because it constituted less than 20% of Cooley's official law program. The ABA conducted a full review of the application, including a site visit, and the findings were reported to the Committee. As the new interpretations of Standard 105 had not been approved, the Committee considered Cooley's application under the existing, more stringent requirements for a branch campus and found it lacking. The Committee summarized its findings in a report, and Cooley responded, expressing its disagreement but stating, "[W]e do not contest that acquiescence is required." The Council did not act on the Committee's recommendations and instead sent the matter back to the Committee for consideration of new information submitted by Cooley. In the interim, Cooley submitted an application for a second satellite campus, this one at Grand Rapids.

In January 2003, the Committee again considered Cooley's proposal using the existing interpretation of Standard 105 and again recommended that the application be denied. The Committee found problems with the proposal's outline of student services, library resources, full-time faculty, and facilities. The ABA also had previously expressed concern regarding Cooley's compliance with Standard 501, which mandates that law schools should only admit students who appear capable of being admitted to the Bar; the Committee felt that adding a new campus, and thus more students, would exacerbate this problem. In February 2003, the Council adopted the Committee's recommendation and denied Cooley's application. Two days later, the House adopted the proposed interpretations of Standard 105 relating to satellite campuses.

On the day Cooley received the Council's ruling, the school informed the ABA that it was increasing its program offering at both campuses above the 20% level, despite the fact that the school had been denied acquiescence. Cooley attempted to justify this move through its reading of ABA Rule 19(d). Rule 19(d) states:

> An approved law school must inform the Consultant prior to implementing any proposed major structural change(s) so that a site evaluation visit may be promptly scheduled. In the event that the major change in organizational structure is the opening of a branch or an additional location, the site evaluation visit shall take place within six months of the start of classes at the branch or additional location.

Cooley argued that the plain language of Rule 19 dictated that an existing accredited law school must only "inform" the ABA of its decision to implement the major change of opening a branch location, so that a site visit could be scheduled "within six months of the start of classes at the branch or additional location." The school reasoned that it had informed the ABA and thus could operate for six months, allowing the ABA to make the necessary site visit.

The ABA immediately informed Cooley that its reading of Rule 19 was "erroneous" and that ABA regulations clearly required acquiescence prior to making any "major change." The letter cited Standard 105, which states: " *Before* a law school makes a major change in its program of legal education or organizational structure it *shall* obtain the acquiescence of the Council for the change." Rule 19(d), the ABA wrote, dealt only with the scheduling of site visits and provided an exception to the default ABA rule that site visits must occur within two years of approval. The ABA also cited

Rule 19(a)[1] and Department of Education regulations, 34 C.F.R. § 602.22(a)(1)-(2)(vii), both of which require approval of substantive changes (including adding a location) before the change takes place. The ABA also informed Cooley that "operating either of these programs without prior acquiescence of the Council would be a violation of Standard 105 and could subject the school to sanctions. "The ABA reaffirmed this position in other letters sent in February, March and August of 2003.

In October 2003, Cooley submitted applications for the opening of full branch campuses at both the Oakland and Grand Rapids locations. In November, Cooley appeared before the Committee regarding its applications. The Committee concluded that Cooley was operating satellite campuses without prior acquiescence in violation of Standard 105 and recommended that the Council not acquiesce in the proposals. The Committee also requested that Cooley appear at its next meeting in January to show cause why the school should not be sanctioned. The Council concurred both in denying the application and in asking Cooley to appear at the show-cause hearing. The Council also informed Cooley that no action would be taken on its October 2003 branch applications until the school's Oakland and Grand Rapids campuses were in compliance with the Standards.

On March 30, 2004, Cooley filed the instant lawsuit. After Cooley filed a motion for a preliminary injunction, the

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[1] Rule 19(a) states: "A major change in the organizational structure of an approved law school raises concern about the school's continued compliance with the Standards. *Before* making a major change in its organizational structure, a provisionally or fully approved law school *shall apply for and obtain* acquiescence in the proposed change." (emphasis added).

parties entered into a Stipulation and Agreed Order, by which Cooley agreed to reduce its offerings at Oakland and Grand Rapids to comply with the 20% limit on non-approved programs. Cooley further agreed not to expand the programs without ABA approval. The ABA agreed to move the show-cause hearing to June. Both parties complied with the Order.

At the June 2004 show-cause hearing, Cooley argued that the ABA did not have the authority to impose sanctions under its own rules, because the school had reduced its program offerings and was now "in compliance" with all ABA rules. The Committee disagreed and recommenced sanctions. The Council adopted the Committee's recommendation, censuring Cooley for its "substantial and persisten noncompliance" with ABA standards and directives and ruling that the school would be ineligible to operate branch or satellite campuses until July 31, 2006. The Council also declined to address the merits of Cooley's branch applications, noting its doubts about the school's ability to maintain a sound legal educational program and stating that any decision regarding opening a satellite campus in 2006 would have to be made with more current information. The Council informed Cooley that it could file a new application for a satellite or branch campus in the summer or fall of 2005.

Following this decision, Cooley filed an amended complaint, again challenging the ABA's refusal to acquiesce in its satellite programs and adding claims relating to the imposition of sanctions. Specifically, Cooley claimed that the ABA denied its common law right to due process and requested judicial review of the ABA's decision. Cooley also brought claims under the Higher Education Act ("HEA"), 20 U.S.C. § 1099b, and under state law. The district court dismissed the HEA claim and state law claims for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and granted summary

judgment on the common law due process claim. Cooley filed a timely appeal.

II.

Only the common law claims are properly before this court. Cooley makes no argument regarding its state law claims except to "acknowledge[] that the district court's holding is consistent with *Foundation [for Interior Design Education Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 528-29 (6th Cir. 2001)], but submit[] that *Foundation* is wrongly decided for the reasons set out in Cooley's brief in the district court." This statement is not sufficient to preserve a claim of error, as a party is not allowed to incorporate by reference into its appellate brief the documents and pleadings filed in the district court. *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003); *see also United States v. Layne*, 192 F.3d 556, 566-67 (6th Cir. 1999) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Thus, Cooley has waived any argument of error pertaining to its state law claims.

Additionally, Cooley may not bring a claim under the HEA because the statute does not create a private right of action. Although this court has never addressed the question of whether the HEA creates such a right, "nearly every court to consider the issue in the last twenty-five years has determined that there is no express or implied private right of action to enforce any of the HEA's provisions." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (collecting cases); *see also College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995);

Labickas v. Ark. State Univ., 78 F.3d 333, 334 (8th Cir. 1996); *L'ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992).

Cooley acknowledges that the HEA does not expressly create a private right of action but argues that one can be inferred from § 1099b(f), which states:

> Notwithstanding any other provision of law, any civil action brought by an institution of higher education seeking accreditation from, or accredited by, an accrediting agency or association recognized by the Secretary . . . and involving the denial, withdrawal, or termination of accreditation of the institution of higher education, shall be brought in the appropriate United States district court.

This court has stated that it will "not [] infer the existence of private rights of action haphazardly." *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000). In determining whether to imply a private right of action, a court looks to four factors.

> First, we consider whether the plaintiff is one of the class for whose especial benefit the statute was enacted. Second, we examine legislative history to see if we can discern any intent either to create or to deny a right of action under the statute. Third, we weigh whether implying a right of action would be consistent with the purposes of the legislative scheme. Finally, we determine whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.

Parks School, 51 F.3d at 1484 (citing *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)). In examining these factors, we see no reason not to follow the holdings of our sister circuits. The HEA was passed to benefit students, not educational institutions. *See* 20 U.S.C. § 1070(a). Although educational institutions derive protections from the statute, they are not the group "for whose especial benefit the statute was enacted." Implying a private right also would be contrary to the legislative scheme, as the statute explicitly provides for enforcement through an administrative action brought by the Secretary. *See id.* § 1099b(*l*)(1). Courts should imply private rights of action only if it finds affirmative evidence that Congress intended to create such a right. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). No such evidence exists in this statute. Rather, § 1099b(f) is labeled "Jurisdiction." Its purpose is to give federal courts exclusive jurisdiction over disputes involving accreditation, like the present case. Such disputes can be resolved, not through the HEA, but through a common law claim for due process and adequate judicial review.

III.

We thus turn to the only remaining issue - Cooley's claim that the ABA's rejection of its proposals and imposition of sanctions violated the school's common law right to due process. The district court granted summary judgment to the ABA, and we review this ruling *de novo*. *Lautermilch v. Findlay City Schs*, 314 F.3d 271, 274 (6th Cir. 2003).

A.

Many courts, including this one, recognize that "quasi-public" professional organizations and accrediting agencies

such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members. *See Foundation for Interior Design Education Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 527-28 (6th Cir. 2001); *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447, 450 (7th Cir. 1994); *Wilfred Acad. of Hair & Beauty Culture v. Southern Ass'n of Colls. & Schools*, 957 F.2d 210, 214 (5th Cir. 1992); *Medical Inst. of Minnesota v. National Ass'n of Trade & Technical Schools*, 817 F.2d 1310, 1314 (8th Cir. 1987). Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing. *See Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Sch., Inc.*, 139 U.S. App. D.C. 217, 432 F.2d 650, 655-56 (D.C. Cir. 1970); *Falcone v. Middlesex County Medical Soc.*, 34 N.J. 582, 170 A.2d 791, 799 (N.J. 1961); *see also Foundation*, 244 F.3d at 527-28 (recognizing the development of this right). The ABA is such an organization, and we must therefore determine whether the ABA afforded Cooley adequate process in denying the applications for satellite programs and imposing sanctions.

To answer this question, we look to federal law. Although this court in *Foundation* applied state law to resolve a similar dispute, the agency in that case was not at that time approved by the Secretary of Education and thus was not subject to the HEA. Federal courts have exclusive jurisdiction over any action brought by a school challenging an accreditation decision made by an organization approved by the Secretary (such as the ABA). 20 U.S.C. § 1099b(f). This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by those bodies. It would make little sense for state law to

govern claims that could not be heard in any state court. "It is hard enough to be a ventriloquist's dummy in diversity suits under *Erie*; it is all but impossible to see how federal courts could apply state law to the actions of accrediting agencies when state courts have been silenced by the provision for exclusive jurisdiction." *Chicago School*, 44 F.3d at 449. If a grant of federal jurisdiction can justify the creation of federal common law, *see, e.g.*, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957), a grant of exclusive jurisdiction necessarily implies the application of federal law.

We must next determine under what principles of federal law we review a decision by an accrediting agency. Both Cooley and the ABA argue that the Administrative Procedure Act ("Act"), 5 U.S.C. § 701, provides the proper framework for reviewing the accreditation process. If the decision was made directly by the Secretary of Education, the presumption would be to review the case under the principles set forth in the Act. The Secretary, however, has delegated his authority regarding law school accreditation to the ABA, which is not a government authority and thus is not governed by the Act. *Id.* §§ 701(b), 702. Despite this delegation, however, the ABA does act on behalf of the Secretary and wields the quasi-governmental power of deciding which law schools are eligible for federal funds. Thus, while the Act does not specifically apply to the ABA, principles of administrative law are useful in determining the standard by which we review the ABA's decision-making process. *See Chicago School*, 44 F.3d at 450.

A number of courts have used these principles in fashioning a standard of review. Though some of the cases applied state law, *see Foundation*, 244 F.3d at 527, and others have left the choice-of-law question unanswered, *see*

Wilfred Acad., 957 F.2d at 214; *Medical Institute of Minnesota*, 817 F.2d at 1314-15, courts have uniformly looked to administrative law in reviewing accreditation decisions. We agree and apply the standard of review that has developed in the common law. This court reviews only whether the decision of an accrediting agency such as the ABA is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence. *See Foundation*, 244 F.3d at 529; *Chicago School*, 44 F.3d at 449.

This standard of review resembles the review applied under the Act. *See* 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). We emphasize, however, that while principles of federal administrative law provide guidance in our analysis, judicial review of accreditation decisions is more limited than review under the Act. Although accrediting agencies perform a quasi-governmental function, they are still private organizations. Courts have made the policy decision to ensure that these organizations act in the public interest and do not abuse their power, but judicial review is limited to protecting the public interest. Recognizing that "the standards of accreditation are not guides for the layman but for professionals in the field of education," *Wilfred Acad.*, 957 F.2d at 214 (quoting *Parsons College v. North Cent. Ass'n of Colleges & Secondary Sch.*, 271 F. Supp. 65, 73 (N.D. Ill. 1967)), great deference should be afforded the substantive rules of these bodies and courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusions. We are not free to conduct a *de novo* review or substitute our judgment for that of the ABA or its Council. Rather, in analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable, we focus on

whether the agency "conform[ed] its actions to fundamental principles of fairness." *Medical Institute of Minnesota*, 817 F.2d at 1314.

B.

Cooley argues that the ABA abused its discretion in refusing to consider the merits of its satellite application at the 2004 hearing and in imposing sanctions in violation of the ABA's own rules. Cooley also alleges that a number of due process violations occurred during the three rounds of hearings in 2002-2004.

1. Imposition of Sanctions

Cooley makes two arguments regarding the ABA's decision to impose sanctions that prevented Cooley from operating a satellite or branch campus until July 31, 2006. First, Cooley argues that the ABA abused its discretion by sanctioning the school in violation of its own rules. Second, Cooley alleges that the sanction was arbitrary and unreasonable and violated due process. An abuse of discretion can only be found if no evidence supports the decision or if the agency misapplied the law. *National Engineering & Contracting Co. v. OSHA*, 928 F.2d 762, 768 (6th Cir. 1991).

Cooley argues that the plain language of ABA Rule 13, which outlines hearings on show-cause orders, prohibited the Council from imposing sanctions because, at the time of the hearing, Cooley was in compliance with all ABA governing standards. Rule 13 states in relevant part:

> (b) Representatives of the law school, including legal counsel, may appear at the hearing and submit

information to demonstrate that the school is currently in compliance with all the Standards or to present a reliable plan for bringing the school into compliance with all of the Standards within a reasonable time.

(d) After the hearing, the Committee shall determine whether the law school is in compliance with the Standards and, if not, it shall direct the law school to take remedial action or shall impose sanctions as appropriate.

(1) . . .

(2) If matters of noncompliance are substantial or have been persistent, then the Committee may recommend to the Council that the school be subjected to sanctions other than removal from the list of approved law schools regardless of whether the school has presented a reliable plan for bringing the school into compliance.

(3) . . .

(e) If the Committee determines that the law school is in compliance, it shall conclude the matter by adopting an appropriate resolution . . . .

Cooley reads these subsections as stating that the purpose of the show-cause hearing is not to determine whether the school has previously violated ABA rules, but rather to determine whether the school "is currently in compliance" with the Standards. Regardless of its previous actions, Cooley argues it had reduced its course offerings below the 20% level at the time of the show-cause hearing; thus, it was "currently in compliance" and the ABA should have "conclude[d] the matter." By not doing so, Cooley contends, the ABA failed to follow the plain language of its own rules, and thus, the decision is not entitled to deference.

We agree with the ABA that Rule 13 cannot be given such a literal interpretation. Subsections (d) and (e) must be read in conjunction with the remainder of Rule 13, as well as other ABA rules. While not dispositive, subsection (d)(2) has a clear focus on past violations that "have been persistent." More importantly, Rule 11(b), which determines when a school can be called to a show-cause hearing, does not require current noncompliance:

> If, upon a review of the information furnished by the law school in response to the Committee's request and other relevant information, the Committee determines that the school *has not demonstrated compliance* with the Standards, the school may be required to appear at a [show-cause] hearing . . . (emphasis added).

The language of this rule exposes the fallacy of Cooley's argument. Under Rule 11, the ABA can require a school that "has not demonstrated compliance" to show cause as to why it should not be sanctioned, regardless of whether the school is currently in compliance with the Standards. It would make little sense for the ABA to require a currently-compliant school to make such a showing if it had no power to sanction that school.

Cooley's interpretation of Rule 13 would also allow schools to come in and out of compliance to avoid sanctions. In this case, the school remained in compliance through the February 2003 acquiescence decision, at which time it increased its course offerings and went out of compliance. Following the Agreed Order and in advance of the June 2004 show-cause hearing, the school quickly reduced its course offerings and came back into compliance. Cooley's actions demonstrate the danger of its reading of Rule 13, which would render the ABA powerless to sanction such blatant

disregard of its rules and standards. This court must defer to an agency's interpretation of its own rules unless plainly erroneous. *See A.D. Transport Express, Inc. v. United States*, 290 F.3d 761, 766 (6th Cir. 2002). While Cooley's proposed interpretation of Rule 13 is perhaps plausible, the ABA's reading is not clearly erroneous and in fact is more logical. Thus, the ABA's imposition of sanctions despite Cooley's compliance with ABA standards at the time of the hearing does not constitute an abuse of discretion.

Cooley also argues that the sanction itself was arbitrary and unreasonable and violated due process. An agency sanction, though, "if within the bounds of its lawful authority, is subject to very limited judicial review," and "the severity of the sanction is not open to review." *Goldstein v. United States*, 9 F.3d 521, 523 (6th Cir. 1993) (citation and internal quotation marks omitted); *see also Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989) ("We review only to ensure that the chosen penalty is an allowable judgment under the law and the facts.") (citations omitted). In this case, the basis for the sanctioning decision was well-known and well-supported by the evidence. Cooley does not dispute in this court its noncompliance during the February 2003 through April 2004 period. The Committee's report, which was adopted by the Council, carefully details the relevant findings and rationales supporting the sanction. Even though the sanction may have had significant impact on Cooley, it cannot be described as arbitrary and unreasonable, especially given the highly deferential standard of review and the evidence of Cooley's blatant and intentional noncompliance with ABA rules.

2. The Acquiescence and Sanctioning Hearings

Cooley next contends that the district court erred in failing to address its claims that the ABA abused its discretion in

denying the satellite applications in 2002 and 2003, before the school's noncompliance. The district court did, however, address these claims, and in any case, they are meritless. Cooley was afforded ample process at each of the ABA hearings - it was notified well in advance, afforded the opportunity to submit evidence to supports its case, and permitted to appear before the body with counsel present. After each group of hearings, the Committee issued a detailed written report outlining its findings and recommendations. The Council in turn wrote a letter outlining its conclusions, referencing the findings of the Committee and the applicable rules and standards.

Cooley's claim that the ABA erred in not using the new interpretations of Standard 105 in the December 2002 and January 2003 evaluations of the school's satellite applications, when those interpretations were not officially adopted until February 2003, is equally baseless. We refuse to hold that an accrediting agency abuses its discretion by following its existing regulations, rather than ones that are proposed but not yet adopted. Such a ruling would turn rulemaking on its head and leave accrediting agencies vulnerable to attack anytime a rule change was in process. The other errors alleged by Cooley - a conflict of interest by one Committee member and the use of an incorrect fact sheet during one of the hearings - do not amount to a due process violation. The supposed conflict of interest arose because one Committee member was the dean of another law school. After considering the matter, the Committee denied the request that the member be replaced, finding no danger of bias and reasoning that Cooley's logic would disqualify almost any member of the Committee. As to the incorrect fact sheet, it was quickly corrected and there is no evidence that the Committee relied on it in reaching its conclusion. As both of these claims of error were duly considered by the ABA and

rejected with sufficient reasoning, they do not constitute an abuse of discretion and do not in any way violate Cooley's right to a fair process.

Cooley also argues that the Council abused its discretion in declining to act on its satellite campus applications at the June 2004 hearing. The Council was well within its discretion not to rule on the merits of the applications, as the imposition of sanctions meant that the satellites would not open until 2006, and thus, the Council did not have sufficient information on which to base its decision. The delay allowed the Committee to conduct an additional site visit in the summer of 2005, giving the ABA the most up-to-date information on which to base the accreditation decision. Cooley has not argued that the decision to delay contradicted ABA rules or established policies. In fact, the focus of Rule 19(d) is to ensure that the ABA makes decisions on satellite and branch campuses based on current information. The decision to delay ruling on the satellite applications did not constitute an abuse of discretion.

Finally, Cooley raises a number of alleged procedural problems with the sanctions hearing: the denial of its request to cross-examine witnesses, the combined prosecutorial and adjudicative functions, and the possible introduction of *ex parte* evidence. As the district court correctly noted, these allegations "do not even hint at the existence of prejudicial error" that would be needed to justify relief. "[A] mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination." *Coalition for Gov't Procurement v. Fed. Prison Ind., Inc.*, 365 F.3d 435, 468 (6th Cir. 2004). In light of the undisputed evidence of substantial and persistent noncompliance, Cooley cannot show that it would not have been sanctioned had these alleged errors not occurred.

IV.

For the foregoing reasons, the decision of the district court is affirmed.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge. I concur in the court's opinion. I write separately because although my point of disagreement does not affect the outcome of this case, I disagree with the majority's interpretation of ABA Rule of Procedure 13(d). Both the plain language and the structure of the rule make plain that the ABA could not sanction Cooley unless Cooley was not in compliance with the ABA Standards at the time of the show cause hearing. At the time of the hearing, the rule, by its plain language, instructed the Committee to determine "whether the law school *is* in compliance with the Standards . . . ." ABA R. PROC. 13(d) (emphasis added). If so, Rule 13(e) directed the Committee to "conclude the matter by adopting the appropriate resolution . . . ." If not, Rule 13(d) required the Committee to "direct the law school to take remedial action" or "impose sanctions." The ABA's use of "is" in the flush language of Rule 13(d) required it to make a present-tense determination of compliance. Therefore, the latter courses of action were permitted only if the Committee found that the school was not in compliance at the time of the hearing. In my view any other interpretation of the rule turns grammar on its head.

That the rule required a determination of compliance at the time of the hearing is evident not only from its plain language, but also from its structure. The subsections of Rule 13(d) that penalize persistent noncompliance were available only upon an initial finding of current noncompliance as required by the flush language of the rule. Furthermore, Rule

14, which described the Council's consideration of sanctions at the time of Cooley's hearing, clearly contemplated that sanctions would apply only to schools that were not currently in compliance. Rule 14(a) provided that the Council "may direct the law school to take remedial action or subject it to sanctions . . . regardless of whether the school has presented a reliable plan for bringing the school into compliance . . . ." Rule 14(c) next provided that, if the Council imposed sanctions on a school that had no remedial plan, the "Committee shall monitor the steps taken by the school to come into compliance." By its plain language, then, the rules contemplated sanctions for only two types of schools: those that were not in compliance but had a remedial plan, and those that were not in compliance and had no such plan. If, as Cooley alleges, it was in compliance at the time of the hearing, it fell into neither category and sanctions were inappropriate.

Finally, Rule 14's focus on compliance makes clear that the ABA intended sanctions to be remedial, not punitive, in nature. Accordingly, Rule 14's final section provided that "[a]t any time that the school presents information on which the Committee concludes that the school is in full compliance with the Standards, the Committee shall recommend to the Council that the school be taken off probation." ABA R. PROC. 14(d). When read in light of Rule 14, the already clear instructions of Rule 13 become inescapable. Under Rule 13(d), the Council was not permitted to sanction Cooley unless Cooley was not in compliance with ABA standards at the time of the show cause hearing.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:04-cv-221

[Filed June 9, 2005]

THOMAS M. COOLEY LAW SCHOOL, a Michigan non-profit corporation, Plaintiff,

v.

THE AMERICAN BAR ASSOCIATION, an Illinois non-profit corporation, JOHN SEBERT, individually and in his official capacity, Defendants.

HON. DAVID W. McKEAGUE

OPINION OF THE COURT

This action challenges certain adverse actions taken by the American Bar Association, frustrating efforts by Thomas M. Cooley Law School to begin operation of two satellite campuses. The first amended complaint sets forth six claims

under federal and state law. Now before the Court are defendants' motions to dismiss and for summary judgment, as well as plaintiff's cross-motion for partial summary judgment. The Court has received and carefully considered voluminous briefing and exhibits from the parties and heard oral arguments of counsel. For the reasons that follow, defendants' motions will be granted and plaintiff's motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The material facts are largely undisputed. Plaintiff Thomas M. Cooley Law School ("Cooley") has its main campus and principal place of business in Lansing, Michigan. It has been accredited by the American Bar Association ("ABA") since 1975.

In September 2002, Cooley began offering first semester classes in Rochester, Michigan, approximately 70 miles east of Lansing, at Oakland University. Under then existing ABA Standards and Rules of Procedure for Approval of Law Schools, Cooley was permitted to offer up to 20% of its educational programs at an additional location without obtaining prior approval or "acquiescence" from the ABA. Beginning with the second semester, in January 2003, Cooley intended to expand the program at Oakland beyond the 20% limit, representing a proposed "major change in organizational structure" that required prior acquiescence by the ABA.

Accordingly, Cooley applied for prior acquiescence for a two-year satellite program, couching its application in terms of proposed amended Standards and Rules that were expected to be adopted by the ABA before Cooley's application was acted on. Unfortunately, the proposed amended Standards and Rules had not been adopted by November 2002, when the

Accreditation Committee ("Committee") addressed Cooley's application. Contrary to what Cooley had been led to believe, the Committee evaluated the application under the existing Standards and Rules, found the application wanting, and recommended denial.

As the Committee's recommendation went before the Council of the Section of Legal Education and Admissions to the Bar ("Council"), Cooley was allowed to supplement the record. Rather than acting on the Committee's recommendation, however, the Council, in December 2002, remanded the matter to the Committee for further consideration of the additional information submitted by Cooley, as well as consideration of an alternative request by Cooley for prior acquiescence in a one-year satellite program. Because the Accreditation Committee would not meet again to consider the matter on remand until January 24, 2003, Cooley was forced to abandon its plan to offer second semester classes at Oakland University in January 2003.

On remand, the Committee again applied the more demanding existing Standards, not the proposed amended Standards, and, in a February 3, 2003 action letter, again recommended denial of the application. The Committee determined that Cooley had failed to demonstrate that addition of the Oakland satellite campus would not interfere with its ongoing efforts to comply with the Standard 501 requirement that it "not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." The Committee was also unpersuaded that student services, library resources, full-time faculty, co-curricular and extra-curricular activities and facilities at the Oakland campus would be adequate to meet requirements of the existing Standards. Over Cooley's objections, presented on February 8, 2003, the Council approved the Committee's

recommendation and denied Cooley's application by action letter dated February 11, 2003.

Contemporaneous with the Council's decision, Cooley gave the ABA written notice of its intention to proceed with operation of satellite campuses both at Oakland, immediately, and in Grand Rapids (approximately 65 miles west of Lansing) in association with Western Michigan University, beginning in May 2003. This course of action was based on Cooley's new determination that Rule 19(d) did not actually require acquiescence *before* implementation of a satellite program.

Consultant John A. Sebert responded on behalf of the ABA by two letters dated February 19, 2003. Mr. Sebert advised Cooley that its construction of Rule 19(d) was erroneous and that continued operation of the satellite campuses without prior acquiescence could subject Cooley to sanctions. Sebert also advised that the proposed amended Standards and Rules had been approved by the ABA House of Delegates, making them effective as of February 11, 2003. These letters were followed by the March 24, 2003 letter of E. Thomas Sullivan, Council Chairperson. He acknowledged that official interpretation of Rule 19(d) was a matter ultimately committed to the Council, on which he expressly declined comment. Yet, he pointed out that any such interpretation would necessarily be made in the context of Standard 105, which clearly requires a law school to obtain acquiescence *prior* to making a major change in its program. Otherwise, Cooley's request for an authoritative interpretation of Rule 19(d) was ignored.

Undeterred by these communications, Cooley went forward with its plans. By letter dated June 3, 2003, Cooley was advised of the Council's refusal to consider granting

"provisional approval" of its applications for acquiescence. Following ABA site visits at both proposed satellite campuses in July 2003, Consultant Sebert advised Cooley by letter dated August 9, 2003, that Cooley appeared not to be operating in compliance with the Standards and that the matter would be referred to the Accreditation Committee. Specifically, Sebert observed that Cooley appeared to be offering more than 15 credits of instruction at both proposed satellite campuses without prior acquiescence, contrary to Standard 105. Consistent with Sebert's notice, the Committee, in turn, determined that Cooley appeared to be in non-compliance with the Standards and Rules. By letter dated October 9, 2003, Cooley was requested to explain its actions in writing and was invited to appear before the Committee to speak to these issues on November 7, 2003.

Following this meeting, the Committee, on November 19, 2003, recommended denial of Cooley's satellite applications because Cooley had been operating the satellite campuses without prior acquiescence. The recommendation included no reference to the substantive requirements for satellite campuses. The Committee expressly noted that Cooley had previously been censured by the ABA in 1997 for offering a program constituting a "major change" (weekend law program) without obtaining prior acquiescence. Thomas M. Cooley Law School President and Dean Don LeDuc was requested to appear before the Committee on January 23, 2004 "to show cause why the School should not be required to take appropriate remedial action, placed on probation, or removed from the list of law schools approved by the American Bar Association." The Council approved the Committee's recommendation at its meeting on December 5, 2003.

Cooley thereafter sought and obtained a continuance of the "show cause" proceeding before the Committee from January 23 to April 23, 2004. It was made clear by the ABA, however, that no further action would be taken on Cooley's applications for acquiescence unless Cooley discontinued operation of the satellite campuses until the ABA granted acquiescence.

Cooley filed its complaint in this action on March 30, 2004. Cooley sought a preliminary injunction to enjoin the ABA from imposing sanctions and require the ABA to proceed with consideration of the merits of its applications. A hearing on the motion for preliminary injunction was conducted on April 16, 2004 and culminated in a Stipulation and Agreed Order, entered on May 10, 2004. The agreement provided that Cooley would refrain from offering more than 15 credit hours of instruction at either satellite campus until the ABA granted acquiescence. In return, the ABA agreed to defer consideration of sanctions until the Committee's next meeting, June 25, 2004. The ABA also agreed that the Committee would then consider and make a recommendation on the merits of Cooley's applications for acquiescence; and that the Council would consider, on the merits, the Committee's recommendations on the applications at its meeting on August 5, 2004. In the meantime, on agreement of the parties, proceedings in this action were stayed.

After the June 25, 2004 proceeding, the Committee issued an action letter dated July 7, 2004, recommending that sanctions be imposed on Cooley for its substantial and persistent non-compliance with Standard 105 by operating both satellite campuses without prior acquiescence. The Committee recommended that Cooley be publicly censured and rendered ineligible to operate any satellite or branch campus prior to September 2005.

On July 14, 2004, the Committee issued two additional action letters, recommending denial of both of Cooley's applications for acquiescence. Both recommendations were based on concern caused by Cooley graduates' subpar and declining bar examination passage results. The Committee determined that such results raised "serious doubt that the Law School maintains an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession, as required by Standard 301(a) and Interpretation 301-1." The Committee thus concluded that Cooley had not met its burden of establishing that operation of either satellite campus "will not detract from the Law School's ability to maintain a sound educational program and that the Law School will be operated in compliance with the Standards."

The Committee's recommendations were taken up by the Council at its August 5 meeting. Action letters issued on August 17. First, the Council approved the Committee's recommendation to impose sanctions on Cooley, but extended the period of Cooley's ineligibility to operate satellite campuses until July 31, 2006. Second, regarding the applications for acquiescence, the Council declined to act. The Council echoed the Committee's concern about bar passage results and about the possibility that the proposed satellite programs would detract from Cooley's ability to maintain a good educational program. Yet, the Council refrained from acting on the applications because the information then available was insufficient to assess the merits of the satellite programs, facilities and faculty when they would next be eligible to operate, after July 31, 2006.

In view of the ABA's actions, Cooley moved to lift the stay and re-open proceedings in this Court. Cooley filed a first amended complaint containing six claims. Count I is a

claim for violation of common law due process. Cooley alleges that the ABA's decisions to impose sanctions and withhold acquiescence are arbitrary and capricious, an abuse of discretion and not supported by substantial evidence. In Count II, Cooley asserts a claim for breach of contract, alleging that the ABA has failed to perform as promised in the Stipulation and Agreed Order. Count III is a claim under the Higher Education Act ("HEA"), 20 U.S.C. § 1099b. Cooley alleges the ABA, in making its accreditation decisions, failed to comply with HEA-mandated standards and procedures. Count IV is a second breach of contract claim. By accepting an $8000 application fee in connection with each satellite application, the ABA is said to have contractually bound itself to process the applications based on its own Rules of Procedure for Approval of Law Schools. By refusing to process the applications in accordance with these Rules, the ABA is said to have breached its contractual obligations. In Count V, Cooley alleges the ABA and its Consultant John Sebert made negligent misrepresentations in connection with the application process, upon which Cooley relied to its detriment. Count VI is a claim for equitable estoppel. Cooley alleges that during the application process, it invested some $5.5 million in reliance upon various actions, representations and failures to act by the ABA, and the ABA is now estopped to deny acquiescence.

II. DEFENDANTS' MOTION TO DISMISS

The ABA's motion to dismiss challenges the facial validity of all of Cooley's claims except count I. The motion attacks the legal sufficiency of the complaint's allegations. Pursuant to Fed. R. Civ. P. 12(b)(6), dismissal is appropriate where the complaint fails to state a claim upon which relief can be granted. The Court must accept all well-pleaded factual allegations as true and may dismiss a claim only if it appears

beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle it to relief under some viable legal theory. *Yuhasz v. Brush Wellman,* Inc., 341 F.3d 559, 563 (6th Cir. 2003); *Lillard v. Shelby County Bd. of Education,* 76 F.3d 716, 726 (6th Cir. 1996).

A. Count II Breach of Contract Claim

When Cooley commenced this action, it moved for a preliminary injunction. The motion was denied as withdrawn when the parties reached agreement regarding ongoing proceedings before the Committee and the Council. The parties' agreement was incorporated into an order of the Court, the "Stipulation and Agreed Order." The obligations assumed by the parties and then embodied in a court order ceased to be mere matters of private contract, but became matters of judicial mandate. The ABA rightly argues that the count II breach of contract claim is a misnomer and fails to state a valid claim. Cooley, in turn, acknowledges that the relief sought in count II is most appropriately pursued through a motion to enforce the Stipulation and Agreed Order. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991)(recognizing court's inherent authority to compel obedience to its lawful orders); *Re/Max Int'l, Inc. v. Realty One, Inc.,* 271 F.3d 633, 641-42 (6th Cir. 2001)(recognizing court's ancillary jurisdiction to enforce settlement agreement incorporated into court order). In fact, Cooley has, in the meantime, filed such a motion.

It follows that Cooley's count II claim for breach of contract is, at best, redundant of its motion to compel enforcement of the settlement agreement. It will therefore be dismissed without prejudice. The motion to enforce the settlement agreement is addressed below.

B. Count III HEA Claim

The Higher Education Act and implementing regulations promulgated by the Department of Education establish a regulatory scheme governing the relationship between accrediting agencies and institutions of higher learning who seek or obtain accreditation. Accreditation is significant because, among other things, it confers eligibility for federal student loan monies. In the HEA, Congress has specifically provided:

> Notwithstanding any other provisions of law, any civil action brought by an institution of higher education seeking accreditation from or accredited by an accrediting agency or association recognized by the Secretary [of Education]. . . . and involving the denial, withdrawal, or termination of accreditation of the institution of higher education, shall be brought in the appropriate United States district court.

20 U.S.C. § 1099b(f). Cooley has invoked this exclusive federal jurisdiction in count III, alleging that the ABA violated requirements established under the HEA. Specifically, the ABA is alleged to have failed to apply procedures that comply with due process, failed to provide adequate specification of accreditation process requirements and deficiencies, and failed to ensure consistency in its decision making.

The ABA moves to dismiss the claim contending there is no private right of action under the HEA.[1] The ABA insists

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[1] Following the hearing in this matter and following the filing of supplemental briefs, as directed by the Court, pertaining to the HEA claim, Cooley filed a motion for leave to file an additional

that § 1099b(f) is simply a jurisdictional grant and that the HEA does not create a private right of action, expressly or impliedly, against anyone other than the Secretary of Education. Indeed, this is the consistent teaching of the case law. The Eleventh Circuit recently noted "that nearly every court to consider the issue in the last twenty-five years has determined that there is no express or implied private right of action to enforce any of the HEA's provisions." *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (collecting cases). *See also Slovinec v. DePaul University*, 332 F.3d 1068, 1069 (7th Cir. 2003) (holding that HEA regulatory scheme is enforceable by and against the Secretary of Education, but does not authorize litigation by private plaintiff against anyone else).

The only arguably contrary authorities do not go far enough to support Cooley's claim. In *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447, 449 (7th Cir. 1994), the Seventh Circuit recognized that Congress, in the HEA, did not specify a source of law for an accreditation-related cause of action. The court concluded, however, that the § 1099b(f) grant of exclusive federal jurisdiction necessarily implies the application of federal law. *Id.* The judicial review provisions of the federal Administrative Procedures Act, 5 U.S.C. § 706, were deemed – as a function of federal common law, rather than state law– to "supply the right perspective for review of accrediting agencies' decisions." *Id.* at 450. Hence, the Seventh Circuit went on to

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supplemental brief, with proposed brief. The ABA has opposed the motion. The Court has considered the proposed supplemental brief, but finds it to be unhelpful to resolution of the ABA's motion to dismiss the HEA claim.

determine whether the accreditation decision before it was "'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law' or reached 'without observance of procedure required by law,' 5 U.S.C. § 706(2)(A),(D)." *Id.* at 449. The court stopped short of recognizing a private right of action for direct enforcement of HEA requirements.

In *Massachusetts School of Law at Andover v. American Bar Ass'n,* 142 F.3d 26, 33 (1st Cir. 1998), the First Circuit held that § 1099b(f) is constitutional and effective to confer federal jurisdiction. Yet, the complaint before the court, removed to federal court on the strength of § 1099b(f), did not include a claim for violation of the HEA itself, and the court did not reach the question whether the HEA creates a private right of action.

Finally, Cooley relies on *Western State University of Southern California v. American Bar Ass'n,* 301 F.Supp. 2d 1129, 1134-35 (C.D. Cal. 2004), where the court mused that unless a private right of action were deemed to be impliedly created by the HEA, § 1099b(f) "might be superfluous." Yet, the *Western State* court expressly declined to decide whether the plaintiff could proceed directly under the HEA. *Id.*

In sum, there is no case law support for the proposition that the HEA expressly or impliedly creates a private right of action in favor of an institution of higher education against an accrediting agency. Rather than engage in speculation as to what Congress might have intended in § 1099b(f), the Court will follow the clear weight of authority, holding that Cooley cannot enforce HEA standards by asserting a claim under the HEA directly against the ABA. The ABA's motion to dismiss

count III of Cooley's first amended complaint for failure to state a valid claim will therefore be granted.[2]

C. Counts IV, V, VI - State Law Claims

Counts IV, V and VI set forth state law claims for breach of contract, negligent misrepresentation and equitable estoppel. The ABA contends these claims, too, must be dismissed, because Cooley's common law due process claim represents its exclusive remedy.

In *Foundation for Interior Design Education Research v. Savannah College of Art & Design,* 244 F.3d 521, 528-29 (6th Cir. 2001), the Sixth Circuit affirmed the district court's ruling that a state law challenge to an accreditation decision implicates deferential judicial review. That is, the court held that the common law standard of review for school accreditation decisions applied, whereby an accreditation decision must be upheld unless shown to be arbitrary and capricious or marked by a denial of due process. *Id.*

In *Foundation,* the appropriateness of this common law standard was derived from Michigan law. The Sixth Circuit observed, however, that this limited deferential review was consistent with the approach taken in numerous other jurisdictions, including challenges to decisions by accrediting agencies approved by the Secretary of Education brought in federal court pursuant to the jurisdictional provision of the HEA, 20 U.S.C. § 1099b(f). The *Foundation* court noted

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[2] Dismissal of the HEA claim appears to be of little substantive significance. The HEA violations alleged in count III appear to be substantially redundant of the common law due process violations asserted in count I, a claim whose facial validity the ABA has not even challenged.

with approval the ruling of the Seventh Circuit in *Chicago School,* 44 F.3d at 449-50, where an accrediting agency's decision challenged under § 1099b(f) was held to be governed by judicial review principles of federal administrative law. In both *Chicago School* and *Foundation,* these judicial review principles were deemed to provide a standard of review substantially similar to the standard that has evolved in the common law, *i.e.,* requiring assessment whether the decision was arbitrary, capricious, an abuse of discretion or reached without observance of procedure required by law. *Foundation,* 244 F.3d at 528; *Chicago School,* 44 F.3d at 449-50. Further, in both decisions, such deferential review was deemed to supplant or preempt other theories of relief, requiring their dismissal.

The Court finds the reasoning of these decisions to be persuasive, if not controlling. The state law claims asserted in counts IV, V and VI are in effect "repackagings" of theories properly addressed under the auspices of Cooley's count I common law due process claim. Cooley's arguments that the ABA's actions were marked by misrepresentations and breaches of contractual obligations are subsumed in, and properly addressed in connection with, the claim that the ABA's decisions are arbitrary and capricious or otherwise not in accord with procedural requirements. Accordingly, counts IV, V and VI will also be dismissed.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

In count I, Cooley challenges both the ABA's decision to impose sanctions and its decisions to withhold acquiescence as violative of its common law due process rights. Specifically, Cooley alleges the ABA' s decisions must be vacated because they are not supported by substantial evidence, are arbitrary and capricious, represent an abuse of

discretion, and were reached without observance of required procedure. Both Cooley and the ABA recognize that this common law due process claim implicates scrutiny analogous to judicial review of an administrative agency's decision. *See Foundation,* 244 F.3d at 528-29; *Chicago School,* 44 F.3d at 449-50. The ABA is not, of course, a federal or state administrative agency. However, its Council of the Section of Legal Education and Admissions to the Bar is recognized by the Secretary of Education as an "accrediting agency" under 20 U.S.C. § 1099b. As such, the Council's accreditation-related decisions are properly challenged in federal court, 20 U.S.C. § 1099b(f), and are properly scrutinized under the standards provided by the federal common law or, in other words, the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 706. *See Chicago School,* 44 F.3d at 449-50; *Foundation,* 244 F.3d at 528.

This Court's review of the ABA's decisions is deferential. *Chicago School,* 44 F.3d at 450. A decision will be upheld unless it is shown to be arbitrary and capricious, unsupported by substantial evidence, an abuse of discretion, contrary to law or not in accordance with required procedures. *Id.* at 449-50; 5 U.S.C. § 706. The Court's review of the ABA's decisions is limited to the existing record, the contents of which are not materially disputed. It is based on this undisputed record that each party claims entitlement to judgment as a matter of law.

A. Count I - Review of Sanction Decision

1. *Not in Accordance with Required Procedure*

First, Cooley contends the ABA's decision to impose sanctions should be vacated because it is contrary to its own rules and therefore not in accordance with required

procedure. Cooley's argument is based on what is said to be the plain and unambiguous language of Rule 13 of the Rules for the Approval of Law Schools. Rule 13 defines the procedure and potential outcome of a hearing before the Committee on a show-cause order.[3] Based on its rather strict

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[3] In relevant part, Rule 13 provides as follows:

Rule 13. Hearing on Show Cause Order.

(a) The Consultant shall furnish to the Committee:

...

(b) Representatives of the law school, including legal counsel, may appear at the hearing and submit information to demonstrate that the school is currently in compliance with all of the Standards or to present a reliable plan for bringing the school into compliance with all of the Standards within a reasonable time.

(c) The Committee may invite the fact finder, if any, and the chairperson or other member of the most recent site evaluation team to appear at the hearing. The law school shall reimburse the fact finder and site evaluation team member for reasonable and necessary expenses incurred in attending the hearing.

(d) After the hearing, the Committee shall determine whether the law school is in compliance with the Standards and, if not, it shall direct the law school to take remedial action or shall impose sanctions, as appropriate.

(1) Remedial action may be ordered pursuant to a reliable plan for bringing the school into compliance with all of the Standards.

(2) If matters of noncompliance are substantial or have

reading of Rule 13, Cooley argues the Committee is authorized to impose a sanction only where the law school is found not to be *currently* (*i. e.*, at the time of the show cause hearing) in compliance with the applicable Standards.

It was by action letter of the Council dated December 17, 2003, that Cooley was first directed to show cause why it should not be subject to a remedial action requirement or sanction for operating the two satellite campuses without prior acquiescence, in violation of Standard 105. By the time the show cause hearing was conducted, on June 25, 2004, it is undisputed that Cooley had ceased offering more than 15 credit hours of instruction at either satellite campus. In other words, Cooley contends, at the time of the show cause hearing, it was currently in compliance with Standard 105. Cooley does not now contend that its unauthorized operation of the satellite campuses was in compliance with the

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been persistent, then the Committee may recommend to the Council that the school be subjected to sanctions other than removal from the list of approved law schools regardless of whether the school has presented a reliable plan for bringing the school into compliance.

(3) If matters of noncompliance are substantial or have been persistent, and the school fails to present a reliable plan for bringing the school into compliance with all of the Standards, the Committee may recommend to the Council that the school be removed from the list of approved schools.

(e) If the Committee determines that the law school is in compliance, it shall conclude the matter by adopting an appropriate resolution, a copy of which shall be transmitted to the president and the dean of the school by the Consultant.

Standards, but argues that its non-complying conduct had become immune from sanction because it ceased before the show cause hearing was conducted.

Cooley's argument is not groundless, but is based on an overly technical and unreasonable construction of Rule 13(d). Indeed, the history of Cooley's failed efforts to obtain acquiescence illustrates the senselessness of its proffered construction. Cooley's applications for prior acquiescence for both campuses were denied in February 2003. Immediately, in direct opposition to the ABA's decisions and in blatant defiance of the ABA's authority, Cooley began operating first the Oakland campus and then the Grand Rapids campus as satellite programs. Notwithstanding repeated notice from the ABA that Cooley's actions could subject it to sanctions, Cooley continued to operate one or both satellite campuses without ABA acquiescence for some 14 months, until April 2004.

The proposition that Cooley can have immunized itself from sanctions for such persistent contemptuous conduct simply by ceasing the misconduct shortly before the show cause hearing flies in the face of both common sense and traditional notions of justice. Even if the literal language of Rule 13(d) supported such a construction, enforcement thereof would not be justified where it so plainly yielded absurd results at odds with the regulatory scheme established in the Rules taken as a whole. *See Riley v. Kurtz,* 361 F.3d 906, 913 (6th Cir. 2004).

Granted, Cooley's construction of the language of Rule 13(d) is not entirely implausible. Viewed in the abstract, the language could be read as requiring a finding that the law school *is* not in compliance as a prerequisite to the imposition of a remedial action requirement or sanctions. After all, Rule

13(e) provides that if the law school *is* in compliance, the matter shall be concluded by "appropriate resolution." But what point in time does "is" refer to? Referring to Rule 13(b), Cooley notes that "is" is accompanied by "currently," implying that the date of the show cause hearing is the determinative point in time. Yet, the prefatory phrase of Rule 13 (d) itself, "after the hearing," read literally, could just as plausibly support the conclusion that the date of the Committee's decision is the determinative point in time. From this, it is clear only that the language of Rule 13 is not intended to define the temporal component with any precision.

Moreover, as the ABA correctly argues, subparagraphs (2) and (3) of Rule 13(d) expressly authorize the Committee to recommend sanctions if matters of noncompliance "have been persistent." This language is unmistakably retrospective, authorizing sanctions, or punishment, for past misconduct, in contrast to, or in addition to, remedial action which operates prospectively. The ABA's semantic argument is at least as strong as Cooley's and its construction is manifestly superior in terms of the practical, real-world operation of the Rule.

Cooley insists that the primary thrust of the Rules is remedial, not punitive; that the ABA's regulatory purpose is to bring law schools into compliance with the Standards. Once compliance is achieved, Cooley argues, there is no role for remedial action or sanctions. Cooley's argument ignores the obvious. A sanction, or punishment, is not strictly backward-looking and retributive. It also serves a restorative or remedial purpose, imposing some restriction or obligation on the offending school in order to right or remit the wrong and restore order. Punishment also has an additional prospective purpose and effect: deterrence. Imposition of a sanction for past misconduct is naturally expected to induce future compliance by deterring future misconduct. The Court thus

remains unpersuaded that the primarily remedial purposes of the Rules foreclose any role for sanctioning past misconduct.

The Court is obliged to defer to an agency's interpretation of its own rules unless plainly erroneous. *A.D. Transport Express, Inc. v. United States,* 290 F.3d 761, 766 (6th Cir. 2002). That Cooley has made a plausible semantic argument does not render the ABA's interpretation unreasonable or inconsistent. *Id.* at 767. Rule 13(d) could have been more artfully drafted. Yet, reading it with an eye toward effectuating its "straightforward and common sense meaning," the Court is firmly convinced that the ABA's construction is reasonable and comports with the Rule's regulatory purposes. *See Riley,* 361 F.3d at 913; *Walker v. Bain,* 257 F.3d 660, 666-67 (6th Cir. 2001). The ABA's imposition of sanctions for Cooley's past misconduct was not therefore, violative of governing procedures.

2. *Arbitrary and Capricious*

Second, Cooley challenges the sanction decision as arbitrary and capricious. In support of this argument, Cooley contends the sanction is disproportionate and was imposed without reference to fixed principles. In particular, Cooley complains of (1) the Council's failure to explain how its noncompliance with the Standards was assessed to be "substantial" or "persistent;" and (2) the Council's failure to explain its doubling of the Committee's recommended sanction, notwithstanding its adoption of the Committee's findings and conclusions. Cooley also contends the Council's failure to articulate its reasoning confounds meaningful judicial review.

This Court's review of an agency's sanction decision is extremely limited. *See Goldstein v. United States*, 9 F.3d 521, 523 (6th Cir. 1993). Unless a sanction is found to be unwarranted in law or without justification in fact, it must be enforced. *Id.* The severity of the sanction, being a matter peculiarly within the agency's expertise, is not open to review. *Id. See also Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989) (noting agency's broad authority to determine appropriate sanction and defining scope of review as limited to ensuring that chosen penalty is allowable judgment under law and facts).

Adopting the Committee's recommended findings and conclusions, the Council determined that Cooley had violated Standard 105 by operating, without prior acquiescence, a satellite campus at Oakland University in Rochester from February 2003 through April 2004, and a satellite campus at Western Michigan University in Grand Rapids from September 2003 through April 2004. That Cooley engaged in this unauthorized conduct is not disputed. Nor is it presently disputed that such conduct was violative of the Standards.[4] Moreover, Cooley deliberately embarked on this course of conduct immediately after acquiescence had been denied, and

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[4] Originally, in its communications with the ABA, Cooley purported to justify this conduct through reliance upon a novel and strained interpretation of Rule 19(d). While ABA representatives gave clear notice that Cooley's interpretation was erroneous, Cooley's request for an official interpretation of Rule 19(d) was not otherwise responded to. In its original complaint, Cooley cited the ABA's refusal to provide an official interpretation as an example of the ABA's arbitrary and capricious conduct and abuse of discretion. In its amended complaint, however, Cooley, tellingly, has all but abandoned any reliance on its contrived interpretation of Rule 19(d) as justification for its conduct.

continued on this course for more than a year, despite repeated warnings. While the Council did not specifically explain *why* such conduct was deemed to represent substantial and persistent noncompliance, it hardly needed to. No other conclusion would have been reasonable. Because a rational connection between the facts found and choice made by the Council can reasonably be discerned, the decision must be upheld. *See Greenbaum v. United States EPA*, 370 F.3d 527, 542 (6th Cir. 2004).

The Council's failure to explain its departure from the Committee's recommended sanction, effectively doubling it, is understandably troubling to Cooley. Yet, finding that imposition of sanctions was authorized and warranted by application of the governing Rules and Standards, and was not without justification in fact, the Court has no alternative but to enforce the sanctions. Further, considering the nature and extent of Cooley's noncompliance, the sanctions imposed do not shock the conscience of the Court or otherwise appear to be unreasonably onerous in any respect. Moreover, inasmuch as the sanctions represent a matter of judgment within the peculiar competence of the Council, the appropriateness of their severity is exempt from judicial scrutiny.

Accordingly, the Court rejects Cooley's contention that the sanction decision is arbitrary and capricious.

3. *Abuse of Discretion/Denial of Procedural of Due Process*

Cooley contends the proceedings that yielded the sanction decision were marred by various denials of Cooley's procedural due process rights and abuse of the Council's or Committee's discretion. Specifically, the ABA is said to have abused its discretion by failing to acknowledge, as a

mitigating circumstance, the extent to which its handling of the acquiescence applications contributed to the dispute. Also, the combination of prosecutorial and adjudicative functions in the same body is said to have resulted in inherent bias that warrants heightened scrutiny. Finally, Cooley complains of various evidentiary rulings that the ABA either did or did not make.

Cooley continues to miss the forest for the trees. These complaints of technical procedural violations, even if not entirely groundless, do not even hint at the existence of prejudicial error, such as might justify relief. On judicial review, "a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination." *Coalition for Gov. Procurement v. Federal Prison Ind., Inc.*, 365 F.3d 435, 468 (6th Cir. 2004) (quoting *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997)). This rule requires Cooley to demonstrate that it was prejudiced by the asserted errors. *Id.*

In view of the undisputed evidence of Cooley's deliberate and prolonged violation of the governing Standards and disrespect of the ABA's authority, the conclusion that Cooley would be subject to sanctions was practically unavoidable. Cooley has failed to demonstrate that any of the asserted procedural violations, even if substantiated, had any impact on the decision making process. In other words, no prejudice is shown and Cooley's procedural objections are overruled.

The Court has thus duly considered Cooley's challenges to the ABA's sanction decision under the applicable deferential review standards and finds that the decision has not been shown to be arbitrary and capricious, an abuse of discretion, or otherwise reached without observance of required procedures. There is no genuine issue of material

fact. To the extent Cooley's count I common law due process claim challenges the sanction decision, the ABA is entitled to judgment as a matter of law.

B. Count I - Review of Decision to Defer Action on Applications

Cooley also challenges the Council's decision to defer action on its applications for acquiescence. The Council's decision is embodied in a two-page letter from Consultant Sebert to President LeDuc. The rationale for the decision is succinctly stated:

> Following a full day of hearing and discussion, and after extensive consideration of the matter on the merits, the Council declined to act on the pending applications at this time in light of the following facts.
>
> (1) In a separate action, the Council imposed sanctions on Cooley pursuant to Rule 14. One of the sanctions imposed is that Cooley is deemed ineligible to operate any satellite or branch campus prior to July 31, 2006.
>
> (2) The information before the Council concerning the School's bar passage results raises serious concern as to whether Cooley has satisfied its burden under Rule 18(p) of demonstrating (1) that the changes will not detract from the law school's ability to maintain a sound educational program leading to the J.D. degree; and (2) that the law school will be operated in compliance with the Standards.
>
> (3) Cooley is scheduled for its next sabbatical site evaluation in the fall of 2005, and it is anticipated that

the site evaluation report will be before the Accreditation Committee in the spring of 2006.

(4) The present applications for acquiescence do not provide the Council with sufficient information upon which the Council can rely in making a decision that will not become applicable until 2006. Therefore, Cooley may file in the summer or fall of 2005 a new application for acquiescence in the establishment of one or more satellite or branch campuses, to be operated after July 31, 2006. The sabbatical site evaluation report will then provide the Committee and the Council current information as to whether, at that time, Cooley is in full compliance with the Standards and Rules. The fact-finding reports prepared in connection with new applications for acquiescence, in combination with the sabbatical site evaluation report, will then provide the basis for determining whether, at that time, Cooley satisfies the criteria for acquiescence in the establishment of satellite or branch campuses that are set forth in the applicable Standards and Rules.

Council action letter, August 17, 2004. Cooley construes this letter as stating two reasons for the Council's declining to act on the applications for acquiescence: (1) the insufficiency of current (2004) information to enable evaluation of programs that Cooley would not be eligible to operate, due to the sanctions, until after July 31, 2006; and (2) "serious concern," stemming from evidence of subpar and declining bar exam pass rates, about Cooley's ability to maintain a sound educational program. Cooley challenges both reasons on various grounds.

As a threshold matter, the Court finds Cooley's characterization of the Council's decision flawed. The Council clearly did not *deny* the applications, on the merits or otherwise. The Committee had recommended denial of both applications because Cooley had not met its burden of demonstrating that the satellite programs would not detract from its ability to maintain a sound educational program. However, the Council did not adopt these recommendations. Rather, it declined to act "at this time," or deferred action on the merits, until more complete and up-to-date information could be evaluated in connection with Cooley's anticipated applications for satellite operations in the Fall of 2006.

Thus, although the Council expressly alluded to its serious concern about bar passage results, such concern hardly represented reason to *defer* action. It could arguably have represented reason to *deny* acquiescence, as the Committee concluded, but the Council did not adopt this approach. Instead, it was the sanctions just imposed by the Council that clearly represented the premise for deferral of action. The ¶2 reference to the Council's serious concern about bar passage results, consistent with the Committee's conclusion, reflected the Council's consideration of the merits and represented a cautionary instruction to Cooley - *i.e.*, that it should be prepared to address this concern when it renewed its applications. Accordingly, the Court confines its review of the Council's decision to its actual, determinative rationale, the insufficiency of current (2004) information as predictor of future (2006) compliance with the applicable Standards and Rules. Cooley challenges this rationale on two grounds, contending it constitutes an abuse of discretion and represents a violation of the parties' Stipulation and Agreed Order.

1. *Abuse of Discretion*

Cooley contends the ABA had a duty to act on the applications and its refusal to do so constitutes an abuse of discretion. The ABA maintains the applications could not be considered in a vacuum, but only in conjunction with the sanctions imposed, which had a significant impact on evaluation of the applications. The ABA insists it had no duty, in this context, to issue advisory opinions. The Court has explained why the sanction decision must be upheld. The legitimacy of the sanctions having thus been established, the present question is reduced to whether, in light of the consequences of the sanctions, the Council abused its discretion by deferring action on the applications.

An abuse of discretion may be found to exist when the reviewing court is firmly convinced that a mistake has been made. *United States v. Kingsley*, 241 F.3d 828, 835 n.12 (6th Cir. 2001). On review of an agency decision, an abuse of discretion will be found if no evidence supports the decision, or if the agency misapplied the law. *National Engineering & Contracting Co. v. O.S.H.A.*, 928 F.2d 762, 768 (6th Cir. 1991). In making this determination, the reviewing court considers whether the agency's decision was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination. *Hazime v. I.N.S.*, 17 F.3d 136, 140 (6th Cir. 1994).

Here, the Council's decision to defer action until the Spring of 2006, when it would have the benefit of Cooley's next Fall 2005 sabbatical site evaluation report, is adequately explained and makes eminent sense. Then, in closer proximity to the Fall of 2006, when Cooley would next be eligible to operate the satellite campuses, the Council would be able to

assess then-current information about the adequacy of the administration, faculty, educational programs, facilities and student services at each location. Had it not deferred action, the Council would have been forced to either grant or deny acquiescence in satellite programs that would not become operational for two years, based on the assumption that all relevant existing facts would remain static in the meantime. The Court finds no abuse of discretion in the Council's preference for acting on fresh rather than stale evidence, on actual rather than presumed facts.

Cooley objects, contending the ABA could have and should have evaluated the merits of the existing applications and at least provided Cooley with notice of any identified deficiencies. On this point, the Court does not disagree with Cooley. While the Council and the Committee have given notice of their concern about bar exam pass rates, their findings and conclusions offer little guidance as to whether the applications meet other required criteria. A more comprehensive and explicit evaluation of the merits appears to have been within the ABA's power and would have proved helpful to Cooley. However, under the governing standards, the Court cannot hold that the ABA's failure to provide such a comprehensive and explicit evaluation is irrational, arbitrary and capricious, or an abuse of discretion. Instead, the ABA's deferral of action on the applications appears to have been well within its discretion, especially considering the tortured history of the applications and the sanctions newly imposed.

2. *Violation of Settlement Agreement*

Cooley also contends the ABA's refusal to act on the applications is in direct violation of the terms of the parties' settlement agreement that led to withdrawal of Cooley's

motion for preliminary injunction in April 2004.[5] With reference to the transcript of the April 16, 2004 hearing, where the agreement was first reached, Cooley insists it was understood and agreed between the parties and the Court that the ABA had promised to address the merits of the applications in conjunction with determining whether sanctions would be imposed. Cooley asks the Court to enforce the settlement agreement and order the ABA to make a decision on the merits of the applications and, in particular, to advise Cooley whether the programs meet the requirements of Interpretations 105-3 and 105-4.

In response, the ABA points out that the parties' oral settlement agreement was, by stipulation, memorialized in an agreed order that specifically detailed the parties' obligations. Pursuant to the Stipulation and Agreed Order, the Council expressly agreed "to *consider and act* on the Accreditation Committee's recommendations on the imposition of sanctions;" and agreed "to *consider* on the merits the Accreditation Committee's recommendations on Cooley Law School's applications for acquiescence." Agreed Order, May 10, 2004, ¶¶ 6, 7 (emphasis added). The ABA maintains that it complied with the terms of the Agreed Order in all respects. That is, while the Council, as promised, considered *and* acted on the sanctions recommendation, it exercised its prerogative to consider without acting on the merits of the acquiescence recommendations.

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[5] This argument is asserted in Cooley's motion to compel enforcement of settlement agreement, filed in lieu of the breach of contract claim originally asserted in count II of its first amended complaint.

Cooley insists that the Agreed Order must be read in light of the hearing transcript. The transcript is said to demonstrate that the Council's obligation to consider the Committee's acquiescence recommendations "on the merits," included a duty to determine whether Cooley's applications satisfied the substantive requirements of the governing Standards.

The settlement agreement placed on the record in general terms on April 16, 2004, led to Cooley's withdrawal of its motion for preliminary injunction, the only matter then before the Court. While the parties had genuinely reached an agreement in principle that warranted a temporary stay of federal court proceedings, it was than abundantly clear from the Court's exchange with counsel, that numerous ramifications were implicated by the agreement and that details remained to be worked out. Finalizing these details required approximately three weeks, culminating in the carefully worded Stipulation and Agreed Order, which both sides presented to the Court as the memorialization of their agreement. The Agreed Order is replete with references to the transcript of the April 16 hearing. Yet, obviously, the parties were not content to let the transcript speak for itself. They chose to embody their agreement in the Agreed Order, to clarify, organize and complete the mutual obligations that would bind them and be subject to enforcement by the Court.

Cooley rightly argues that the Court has the power to enforce an oral settlement agreement even though it has not been reduced to writing. *Re/Max Int'l, Inc.*, 271 F.3d at 646. Yet, once the agreement was reduced to writing in the Agreed Order, the memorialization of the parties' agreement superseded prior oral negotiations or understandings. *See Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 455 (6th Cir. 2005). Absent fraud or mistake or some other invalidating

cause, evidence of such prior negotiations cannot be used to contradict or alter the written terms. *Id.*

Here, the ABA expressly undertook to consider the merits of the Committee's acquiescence recommendations in ¶ 7 of the Agreed Order. Paragraph 7 refers to page 105 of the hearing transcript, which includes discussion of the Committee's and the Council's ability and willingness to address the acquiescence applications at their June and August 2004 meetings, respectively, *if* Cooley agreed to comply with Standard 105 by ceasing satellite operations until obtaining acquiescence. In this discussion, counsel for the ABA expressly refrained from making any assurance as to "what they would decide." Instead, the discussion recorded subsequent to page 105 includes only (1) the ABA's acknowledgment that evaluation of the merits of the applications would be relevant in determining the nature of sanctions (pp. 107-111); and (2) the ABA's agreement to take up the matters of sanctions and acquiescence together (pp. 116-127).

The transcript of the parties' oral settlement agreement does not, therefore, substantiate the existence of any more specific commitment by the ABA to evaluate and render decisions on the merits of the applications. Indeed, in the Agreed Order, the ABA expressly reserved discretion – discretion limited only by its own Standards, Rules and Interpretations – to impose sanctions and to decide whether to acquiesce in the applications. Agreed Order ¶¶ 9-12. Hence, even if the Agreed Order is read in light of the transcript – for the purpose not of altering but of clarifying the meaning of its terms – it is clear that the ABA did not violate the Agreed Older by deferring action on the applications for acquiescence. Further, it is equally clear that the Council, by adopting the Committee's findings and conclusions, and by

expressing its serious concern about bar passage results, did, within the broad parameters of its expressly reserved discretion, consider the merits of the Committee's acquiescence recommendations. There is, thus, no genuine issue of material fact. The ABA did not violate the terms of the Agreed Order. Cooley's motion to compel enforcement of the settlement agreement will therefore be denied.

IV. CONCLUSION

The Court has carefully considered the parties' arguments, briefs and exhibits and has found Cooley's positions in this litigation legally and factually wanting. In counts II - VI of its first amended complaint, Cooley has asserted claims for relief that are not legally cognizable. The ABA's motion to dismiss these five claims for failure to state valid claims will therefore be granted.

The count I common law due process claim is properly before the Court. Pursuant to this claim, the Court has undertaken judicial review of the ABA's decisions to impose sanctions on Cooley and to defer action on its applications for acquiescence. Applying, as it must, limited deferential review to the materially undisputed record of proceedings before the ABA, the Court concludes that Cooley has failed to demonstrate that the ABA acted arbitrarily or capriciously, abused its discretion, or acted without observance of required procedure. The ABA is therefore entitled to judgment as a matter of law, upholding all of its decisions over Cooley's challenges.

A judgment order consistent with this opinion shall issue forthwith.

Dated: June 9, 2005

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

APPENDIX C

TITLE 20. EDUCATION
CHAPTER 28. HIGHER EDUCATION RESOURCES AND STUDENT ASSISTANCE PROGRAMS
STUDENT ASSISTANCE
PROGRAM INTEGRITY
ACCREDITING AGENCY RECOGNITION

20 U.S.C. § 1099b

§ 1099b. Recognition of accrediting agency or association

(a) Criteria required. No accrediting agency or association may be determined by the Secretary to be a reliable authority as to the quality of education or training offered for the purposes of this Act or for other Federal purposes, unless the agency or association meets criteria established by the Secretary pursuant to this section. The Secretary shall, after notice and opportunity for a hearing, establish criteria for such determinations. Such criteria shall include an appropriate measure or measures of student achievement. Such criteria shall require that--

(1) the accrediting agency or association shall be a State, regional, or national agency or association and shall demonstrate the ability and the experience to operate as an accrediting agency or association within the State, region, or nationally, as appropriate;

(2) such agency or association--

(A) (i) for the purpose of participation in programs under this Act, has a voluntary membership of

institutions of higher education and has as a principal purpose the accrediting of institutions of higher education; or

(ii) for the purpose of participation in other programs administered by the Department of Education or other Federal agencies, has a voluntary membership and has as its principal purpose the accrediting of institutions of higher education or programs;

(B) is a State agency approved by the Secretary for the purpose described in subparagraph (A); or

(C) is an agency or association that, for the purpose of determining eligibility for student assistance under this title, conducts accreditation through (i) a voluntary membership organization of individuals participating in a profession, or (ii) an agency or association which has as its principal purpose the accreditation of programs within institutions, which institutions are accredited by another agency or association recognized by the Secretary;

(3) if such agency or association is an agency or association described in--

(A) subparagraph (A)(i) of paragraph (2), then such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization;

(B) subparagraph (B) of paragraph (2), then such agency or association has been recognized by the Secretary on or before October 1, 1991; or

(C) subparagraph (C) of paragraph (2) and such agency or association has been recognized by the Secretary on or before October 1, 1991, then the Secretary may waive the requirement that such agency or association is separate and independent, both

administratively and financially of any related, associated, or affiliated trade association or membership organization upon a demonstration that the existing relationship has not served to compromise the independence of its accreditation process;

(4) such agency or association consistently applies and enforces standards that ensure that the courses or programs of instruction, training, or study offered by the institution of higher education, including distance education courses or programs, are of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered;

(5) the standards for accreditation of the agency or association assess the institution's--

(A) success with respect to student achievement in relation to the institution's mission, including, as appropriate, consideration of course completion, State licensing examinations, and job placement rates;

(B) curricula;

(C) faculty;

(D) facilities, equipment, and supplies;

(E) fiscal and administrative capacity as appropriate to the specified scale of operations;

(F) student support services;

(G) recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising;

(H) measures of program length and the objectives of the degrees or credentials offered;

(I) record of student complaints received by, or available to, the agency or association; and

(J) record of compliance with its program responsibilities under title IV of this Act based on the most recent student loan default rate data provided by

the Secretary, the results of financial or compliance audits, program reviews, and any such other information as the Secretary may provide to the agency or association;

except that subparagraphs (A), (H), and (J) shall not apply to agencies or associations described in paragraph (2)(A)(ii) of this subsection;

(6) such agency or association shall apply procedures throughout the accrediting process, including evaluation and withdrawal proceedings, that comply with due process, including--

(A) adequate specification of requirements and deficiencies at the institution of higher education or program being examined;

(B) notice of an opportunity for a hearing by any such institution;

(C) the right to appeal any adverse action against any such institution; and

(D) the right to representation by counsel for any such institution;

(7) such agency or association shall notify the Secretary and the appropriate State licensing or authorizing agency within 30 days of the accreditation of an institution or any final denial, withdrawal, suspension, or termination of accreditation or placement on probation of an institution, together with any other adverse action taken with respect to an institution; and

(8) such agency or association shall make available to the public, upon request, and to the Secretary, and the State licensing or authorizing agency a summary of any review resulting in a final accrediting decision involving denial, termination, or suspension of accreditation, together with the comments of the affected institution.

(b) Separate and independent defined. For the purpose of subsection (a)(3), the term "separate and independent" means that--

(1) the members of the postsecondary education governing body of the accrediting agency or association are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

(2) among the membership of the board of the accrediting agency or association there shall be one public member (who is not a member of any related trade or membership organization) for each six members of the board, with a minimum of one such public member, and guidelines are established for such members to avoid conflicts of interest;

(3) dues to the accrediting agency or association are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(4) the budget of the accrediting agency or association is developed and determined by the accrediting agency or association without review or resort to consultation with any other entity or organization.

(c) Operating procedures required. No accrediting agency or association may be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in the programs authorized under this title, unless the agency or association--

(1) performs, at regularly established intervals, on-site inspections and reviews of institutions of higher education (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and ensures that accreditation team

members are well-trained and knowledgeable with respect to their responsibilities;

(2) requires that any institution of higher education subject to its jurisdiction which plans to establish a branch campus submit a business plan, including projected revenues and expenditures, prior to opening the branch campus;

(3) agrees to conduct, as soon as practicable, but within a period of not more than 6 months of the establishment of a new branch campus or a change of ownership of an institution of higher education, an on-site visit of that branch campus or of the institution after a change of ownership;

(4) requires that teach-out agreements among institutions are subject to approval by the accrediting agency or association consistent with standards promulgated by such agency or association;

(5) maintains and makes publicly available written materials regarding standards and procedures for accreditation, appeal procedures, and the accreditation status of each institution subject to its jurisdiction; and

(6) discloses publicly whenever an institution of higher education subject to its jurisdiction is being considered for accreditation or reaccreditation.

(d) Length of recognition. No accrediting agency or association may be recognized by the Secretary for the purpose of this Act for a period of more than 5 years.

(e) Initial arbitration rule. The Secretary may not recognize the accreditation of any institution of higher education unless the institution of higher education agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

(f) Jurisdiction. Notwithstanding any other provision of law, any civil action brought by an institution of higher education seeking accreditation from, or accredited by, an accrediting agency or association recognized by the Secretary for the purpose of this title and involving the denial, withdrawal, or termination of accreditation of the institution of higher education, shall be brought in the appropriate United States district court.

(g) Limitation on scope of criteria. Nothing in this Act shall be construed to permit the Secretary to establish criteria for accrediting agencies or associations that are not required by this section. Nothing in this Act shall be construed to prohibit or limit any accrediting agency or association from adopting additional standards not provided for in this section.

(h) Change of accrediting agency. The Secretary shall not recognize the accreditation of any otherwise eligible institution of higher education if the institution of higher education is in the process of changing its accrediting agency or association, unless the eligible institution submits to the Secretary all materials relating to the prior accreditation, including materials demonstrating reasonable cause for changing the accrediting agency or association.

(i) Dual accreditation rule. The Secretary shall not recognize the accreditation of any otherwise eligible institution of higher education if the institution of higher education is accredited, as an institution, by more than one accrediting agency or association, unless the institution submits to each such agency and association and to the Secretary the reasons for accreditation by more than one such agency or association and demonstrates to the Secretary reasonable cause for its accreditation by more than one agency or association. If the institution is accredited, as an institution, by more than one

accrediting agency or association, the institution snall designate which agency's accreditation shall be utilized in determining the institution's eligibility for programs under this Act.

(j) Impact of loss of accreditation. An institution may not be certified or recertified as an institution of higher education under section 102 and subpart 3 of this part [20 U.S.C. §§ 1002, 1099c *et seq.*] or participate in any of the other programs authorized by this Act if such institution--

(1) is not currently accredited by any agency or association recognized by the Secretary;

(2) has had its accreditation withdrawn, revoked, or otherwise terminated for cause during the preceding 24 months, unless such withdrawal, revocation, or termination has been rescinded by the same accrediting agency; or

(3) has withdrawn from accreditation voluntarily under a show cause or suspension order during the preceding 24 months, unless such order has been rescinded by the same accrediting agency.

(k) Religious institution rule. Notwithstanding subsection (j), the Secretary shall allow an institution that has had its accreditation withdrawn, revoked, or otherwise terminated, or has voluntarily withdrawn from an accreditation agency, to remain certified as an institution of higher education under section 102 and subpart 3 of this part [20 U.S.C. §§ 1002, 1099c *et seq.*] for a period sufficient to allow such institution to obtain alternative accreditation, if the Secretary determines that the reason for the withdrawal, revocation, or termination--

(1) is related to the religious mission or affiliation of the institution; and

(2) is not related to the accreditation criteria provided for in this section.

(l) Limitation, suspension, or termination of recognition.

(1) If the Secretary determines that an accrediting agency or association has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section, the Secretary shall--

(A) after notice and opportunity for a hearing, limit, suspend, or terminate the recognition of the agency or association; or

(B) require the agency or association to take appropriate action to bring the agency or association into compliance with such requirements within a timeframe specified by the Secretary, except that--

(i) such timeframe shall not exceed 12 months unless the Secretary extends such period for good cause; and

(ii) if the agency or association fails to bring the agency or association into compliance within such timeframe, the Secretary shall, after notice and opportunity for a hearing, limit, suspend, or terminate the recognition of the agency or association.

(2) The Secretary may determine that an accrediting agency or association has failed to apply effectively the standards provided in this section if an institution of higher education seeks and receives accreditation from the accrediting agency or association during any period in which the institution is the subject of any interim action by another accrediting agency or association, described in paragraph (2)(A)(i), (2)(B), or (2)(C) of subsection (a) of this section, leading to the suspension, revocation, or termination of accreditation or the institution has been notified of the threatened loss of accreditation, and the

due process procedures required by such suspension, revocation, termination, or threatened loss have not been completed.

(m) Limitation on the Secretary's authority. The Secretary may only recognize accrediting agencies or associations which accredit institutions of higher education for the purpose of enabling such institutions to establish eligibility to participate in the programs under this Act or which accredit institutions of higher education or higher education programs for the purpose of enabling them to establish eligibility to participate in other programs administered by the Department of Education or other Federal agencies.

(n) Independent evaluation.

(1) The Secretary shall conduct a comprehensive review and evaluation of the performance of all accrediting agencies or associations which seek recognition by the Secretary in order to determine whether such accrediting agencies or associations meet the criteria established by this section. The Secretary shall conduct an independent evaluation of the information provided by such agency or association. Such evaluation shall include--

(A) the solicitation of third-party information concerning the performance of the accrediting agency or association; and

(B) site visits, including unannounced site visits as appropriate, at accrediting agencies and associations, and, at the Secretary's discretion, at representative member institutions.

(2) The Secretary shall place a priority for review of accrediting agencies or associations on those agencies or associations that accredit institutions of higher education that participate most extensively in the programs authorized by this title and on those agencies or

associations which have been the subject of the most complaints or legal actions.

(3) The Secretary shall consider all available relevant information concerning the compliance of the accrediting agency or association with the criteria provided for in this section, including any complaints or legal actions against such agency or association. In cases where deficiencies in the performance of an accreditation agency or association with respect to the requirements of this section are noted, the Secretary shall take these deficiencies into account in the recognition process. The Secretary shall not, under any circumstances, base decisions on the recognition or denial of recognition of accreditation agencies or associations on criteria other than those contained in this section. When the Secretary decides to recognize an accrediting agency or association, the Secretary shall determine the agency or association's scope of recognition. If the agency or association reviews institutions offering distance education courses or programs and the Secretary determines that the agency or association meets the requirements of this section, then the agency shall be recognized and the scope of recognition shall include accreditation of institutions offering distance education courses or programs.

(4) The Secretary shall maintain sufficient documentation to support the conclusions reached in the recognition process, and, if the Secretary does not recognize any accreditation agency or association, shall make publicly available the reason for denying recognition, including reference to the specific criteria under this section which have not been fulfilled.

(o) Regulations. The Secretary shall by regulation provide procedures for the recognition of accrediting agencies or associations and for the appeal of the Secretary's decisions.

APPENDIX D

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX E

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Standards for Approval of Law Schools

2002-2003

ABA Standards for Approval of Law Schools, 2002-2003

* * *

Standard 105. MAJOR CHANGE IN PROGRAM OR STRUCTURE.

Before a law school makes a major change in its program of legal education or organizational structure it shall obtain the acquiescence of the Council for the change.

Interpretation 105-1:
Major changes in the program of legal education or the organizational structure of a law school include:

(1) Instituting a new full-time or part-time division;

(2) Changing from a full-time to a part-time program or from a part-time to a full-time program;

(3) Establishing a two-year undergraduate/four year law school or similar program;

(4) Establishing a new or different program leading to a degree in addition to the J.D. degree;

(5) A change in program length measurement from clock hours to credit hours;

(6) A substantial increase in the number of clock or credit hours that are required far graduation;

(7) Merging or affiliating with one or more approved or unapproved law schools;

(8) Merging or affiliating with one or more universities;

(9) Materially modifying the law school's legal status or institutional relationship with a parent institution;

(10) Acquiring another law school or educational institution;

(11) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(12) Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university; and

(13) Opening of a branch or an additional location at which the law school offers at least 20 percent of its

educational program. (August 1996; August 1997; August 1998, August 2001)

Interpretation 105-2:
The establishment of a branch campus of an approved law school requires that the branch campus have a permanent full-time faculty, an adequate working library, adequate support staff, and an adequate physical facility, including plans for a permanent physical facility. (February 1979; August 1996)

APPENDIX F

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

STANDARDS
rules of procedure

for approval of law schools
2003 - 2004

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Standard 105. MAJOR CHANGE IN PROGRAM OR STRUCTURE.

Before a law school makes a major change in its program of legal education or organizational structure it shall obtain the acquiescence of the Council for the change.

Interpretation 105-1:
Major changes in the program of legal education or the organizational structure of a law school include:

(1) Instituting a new full-time or part-time division;

(2) Changing from a full-time to a part-time program or from a part-time to a full-time program;

(3) Establishing a two-year undergraduate/four year law school or similar program;

(4) Establishing a new or different program leading to a degree other than the J.D. degree;

(5) A change in program length measurement from clock hours to credit hours;

(6) A substantial increase in the number of clock or credit hours that are required for graduation;

(7) Merging or affiliating with one or more approved or unapproved law schools;

(8) Merging or affiliating with one or more universities;

(9) Materially modifying the law school's legal status or institutional relationship with a parent institution;

(10) Acquiring another law school or educational institution;

(11) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(12) Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university; and

(13) Opening of a Branch campus or Satellite campus. (August 1996; August 1997; August 1998; August 2001; February 2003; August 2003)

Interpretation 105-2:
The establishment of a Branch campus of an approved law school constitutes the creation of a different law school. Consequently, a Branch campus must have a permanent full-time faculty, an adequate working library, adequate support and administrative staff and adequate physical facilities and technological capacities. A Branch Campus shall apply for provisional approval under the provisions of Standard 102 and Rule 4. (February 1979; August 1996; February 2003)

Interpretation 105-3:
The establishment of a Satellite campus at which a law school offers no more than the first-year of its full-time program, or the first three semesters (or equivalent) of its part-time program, requires at least:

(1) Full-time faculty of the law school who teach substantially all of the curriculum offered at the Satellite campus and who are reasonably available at the Satellite campus for consultation with students;

(2) Library resources and staff at the Satellite campus that are adequate to support the curriculum offered at the Satellite campus and that are reasonably accessible to students at the Satellite campus;

(3) Academic advising, career services and other student support services that are adequate to support the program offered at the Satellite campus, that are reasonably equivalent to such services offered to

similarly situated students at the law school's main campus and that are offered in person at the Satellite campus or otherwise are reasonably accessible to students at the Satellite campus;

(4) That students attending the Satellite campus have access to the school's co-curricular activities and other educational benefits on a roughly proportional basis; and

(5) Physical facilities and technological capacities at the Satellite campus that are adequate to support the curriculum offered at and the students attending the Satellite campus. (February 2003)

Interpretation 105-4:
A law school that seeks to establish a Satellite campus at which it will offer courses beyond its first-year program must show that it can adequately support its program at the Satellite campus. It must establish at least:

(1) That students attending the Satellite campus have reasonable access to full-time faculty, library resources and staff and academic advising, career services and other support services that are adequate to support the program that the law school offers at the Satellite campus and that are reasonably equivalent to the resources and services offered to similarly situated students at the law school's main campus;

(2) That students attending the Satellite campus have access to the school's co-curricular activities and other educational benefits on a roughly proportional basis; and

(3) That the physical facilities and technological capacities at the Satellite campus are adequate to support the curriculum offered at and the students attending the Satellite campus. (February 2003.)

Interpretation 105-5:
If a student would be able to take at a Satellite campus the equivalent of two-thirds or more of the credit hours that a law school requires for the award of the J.D. degree, all of the requirements set forth in Interpretation 105-2 apply to the establishment of such a Satellite campus except the requirement concerning provisional approval.

Interpretation 105-6:
The Council has delegated to the Accreditation Committee the authority to grant acquiescence in the types of major changes listed in Interpretation 105-1(4), (5) and (6). (February 2003)

APPENDIX G

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Rules of Procedure for Approval of Law Schools

ABA Rules of Procedure for Approval of Law Schools, 2002-2003

Rule 3. Accreditation Committee Consideration - Uniform Provisions

(a) Upon completion of the procedures provided in Rule 2, the Accreditation Committee shall meet to assess approval based upon a record consisting of the law school's application (in the case of a school seeking provisional or full approval), the site evaluation report, any written material submitted in a timely manner by the school, and other relevant information.

(b) The chairperson or a member of the site evaluation team may be present at the Committee meeting at which the law school is considered if requested by the chairperson of the Committee. The reasonable and necessary expenses of such attendance shall be the responsibility of the law school.

(c) In the case of a school seeking provisional or full approval, representatives of the law school may appear

and make a presentation at the meeting of the Committee at which the school's application is considered.

(d) After the Committee makes its decision, the Consultant shall inform the president and the dean of the law school of the decision by an action letter. If the decision is adverse to the law school, the action letter shall contain the Committee's specific reasons

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APPENDIX H

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Rules of Procedure for Approval of Law Schools

ABA Rules of Procedure for Approval of Law Schools, 2002-2003

Rule 13. Hearing on Show Cause Order.

(a) The Consultant shall furnish to the Committee:

(1) The fact finder's report, if any;

(2) The most recent site evaluation report;

(3) Site evaluation questionnaire;

(4) Annual questionnaire;

(5) The Consultant's action letters written subsequent to the most recent site evaluation report;

(6) Notice of Committee hearing; and

(7) Other relevant information.

(b) Representatives of the law school, including legal counsel, may appear at the hearing and submit

information to demonstrate that the school is currently in compliance with all of the Standards or to present a reliable plan for bringing the school into compliance with all of the Standards within a reasonable time.

(c) The Committee may invite the fact finder, if any, and the chairperson or other member of the most recent site evaluation team to appear at the hearing. The law school shall reimburse the fact finder and site evaluation team member for reasonable and necessary expenses incurred in attending the hearing.

(d) After the hearing, the Committee shall determine whether the law school is in compliance with the Standards and, if not, it shall direct the law school to take remedial action or shall impose sanctions, as appropriate.

(1) Remedial action may be ordered pursuant to a reliable plan for bringing the school into compliance with all of the Standards.

(2) If matters of noncompliance are substantial or have been persistent, then the Committee may recommend to the Council that the school be subjected to sanctions other than removal from the list of approved law schools regardless of whether the school has presented a reliable plan for bringing the school into compliance.

(3) If matters of noncompliance are substantial or have been persistent, and the school fails to present a reliable plan for bringing the school into compliance with all of the Standards, the Committee may recommend to the Council that the school be removed from the list of approved schools.

(e) If the Committee determines that the law school is in compliance, it shall conclude the matter by adopting an appropriate resolution, a copy of which shall be transmitted to the president and the dean of the school by the Consultant.

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APPENDIX I

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Rules of Procedure for Approval of Law Schools

ABA Rules of Procedure for Approval of Law Schools, 2002-2003

Rule 14. Council Consideration of Committee Recommendation for Imposition of Sanctions.

(a) The Council may direct the law school to take remedial action or subject it to sanctions other than removal from the list of approved law schools regardless of whether the school has presented a reliable plan for bringing the school into compliance with all of the Standards.

(b) The Consultant shall inform the president and the dean of the law school of the decision by an action letter. If the decision is adverse to the law school, the action letter shall contain the Council's specific reasons.

(c) If the Council imposes sanctions in the absence of a reliable plan for bringing the school into compliance with all of the Standards, the Accreditation Committee shall monitor the steps taken by the school to come into compliance. If the Council imposes sanctions pursuant to a reliable plan for bringing the school into compliance

with the Standards, the Accreditation Committee shall monitor the steps taken by the school for meeting its plan. At any time that the school is not making progress toward compliance with all of the Standards, or at any time that the school is not meeting the obligations of its plan, or if at the end of a period of time set by the Council for coming into compliance the school has not achieved compliance with all of the Standards, the Committee shall forward a recommendation that the school be removed from the list of approved schools. This recommendation shall be heard by the Council under the procedures of this Rule, but the only issue for Council consideration will be whether the school has met the terms of its plan or is in compliance with all of the Standards.

(d) At any time that the school presents information on which the Committee concludes that the school is in full compliance with the Standards, the Committee shall recommend to the Council that the school be taken off probation. This recommendation will be heard

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APPENDIX J

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Rules of Procedure for Approval of Law Schools

ABA Rules of Procedure for Approval of Law Schools, 2002-2003

Rule 19. Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School.

(a) A major change in the organizational structure of an approved law school raises concern about the school's continued compliance with the Standards. Before making a major change in its organizational structure, a provisionally or fully approved law school shall apply for and obtain acquiescence in the proposed change.

(b) A major change in the organizational structure of an approved law school which requires Council acquiescence means:

(1) Materially modifying the law school's legal status or institutional relationship with a parent institution;

(2) Merging or affiliating with one or more approved or unapproved law schools;

(3) Acquiring another law school or educational institution;

(4) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(5) Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university;

(6) Opening of a branch or an additional location at which the law school offers at least 20 percent of its educational program;

(7) Merging or affiliating with one or more universities; or

(8) A change in the control of the school resulting from a change in the ownership of the school or a contractual arrangement.

(c) For purposes of this Rule:

(1) The transfer of all or substantially all of the academic program or assets of an approved law school to a new institution, whether a university or freestanding institution, constitutes a decision to close the approved law school and open a different law school.

(2) Opening of a branch by an approved law school is treated as the creation of a different law school. A law school seeking to establish a branch shall submit to the

Consultant, as part of its application, a business plan that contains the following information concerning the proposed branch: a description of the educational program to be offered; projected revenues, expenditures and cash flow; and the operational, management and physical resources of the proposed branch.

(3) After written notice and an opportunity for a written response, the Accreditation Committee shall determine whether any other proposed structural change constitutes the creation of a different law school.

(d) An approved law school must inform the Consultant prior to implementing any proposed major structural change(s) so that ~~a site evaluation~~ visit may be promptly scheduled. In the event that the major change in organizational structure is the opening of a branch or an additional location, the site evaluation visit shall take place within six months of the start of classes at the branch or additional location.

(e) If a different school will be created as a result of the major structural change, the different school may apply for approval pursuant to provisions of Rule 4. If the different school demonstrates that it is in full compliance with the Standards as provided in Standard 103, the Committee shall recommend that it be fully approved. Such recommendation may be conditioned upon further site evaluation visits or other requirements. If the different school is not in full compliance with the Standards, but it substantially complies with each of the Standards as provided in Standard 102, the Committee shall recommend that it be provisionally approved. The

Committee may also recommend that the school will be allowed to seek full approval in a period of time shorter than that provided in Standard 103.

(f) If the Accreditation Committee determines that the proposed change will not create a different law school, the law school shall request acquiescence by the Council in compliance with Rule 18.

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APPENDIX K

AMERICAN BAR ASSOCIATION

SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Rules of Procedure for Approval of Law Schools

2003-2004

Rule 19. Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School.

(a) A major change in the organizational structure of an approved law school raises concern about the school's continued compliance with the Standards. Before making a major change in its organizational structure, a provisionally or fully approved law school shall apply for and obtain acquiescence in the proposed change.

(b) A major change in the organizational structure of an approved law school which requires Council acquiescence means:

(1) Materially modifying the law school's legal status or institutional relationship with a parent institution;

(2) Merging or affiliating with one or more approved or unapproved law schools;

(3) Acquiring another law school or educational institution;

(4) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(5) Transferring all, or substantially all, of the academic program or assets of the approved law school to another law school or university;

(6) Opening of a Branch campus or Satellite campus at which a student could take the equivalent of 16 or more semester credit hours toward the law school's J.D. degree;

(7) Merging or affiliating with one or more universities; or

(8) A change in the control of the school resulting from a change in the ownership of the school or a contractual arrangement.

(c) For purposes of this Rule:

(1) The transfer of all or substantially all of the academic program or assets of an approved law school to a new institution, merging or affiliating with one or more approved or unapproved law schools, or merging or affiliating with one or more universities may amount to the closure of an approved law school and the opening of a different law school. If the Accreditation Committee determines, after written notice and an opportunity

for written response, that such a change does amount to the closure of an approved law school and the opening of a different law school, it shall so notify the law school(s). If the Accreditation Committee determines that any proposed structural change constitutes the creation of a different law school, it shall recommend to the Council that any acquiescence in the proposed structural change be accompanied by a requirement that the school apply for provisional approval under the provisions of Standard 102 and Rule 4.

(2) Factors that shall be considered in making the determination of whether the events listed in paragraph (1) above constitute the closure of an approved law school and the opening of a different law school include, without limitation, whether such events are likely to result in

(a) significant reduction in the financial resources available to the law school;
(b) significant change, present or planned, in the governance of the law school;
(c) significant change, present or planned, in the overall composition of the faculty and staff at the law school;
(d) significant change, present or planned, in the educational program offered by the law school; or
(e) significant change, present or planned, in the location or physical facilities of the law school.

(3) Opening of a Branch campus by an approved law school is treated as the creation of a different law school. A Branch campus shall apply for provisional

approval under the provisions of Standard 102 and Rule 4. A law school seeking to establish a Branch campus shall submit to the Consultant, as part of its application, a business plan that contains the following information concerning the proposed Branch campus: a description of the educational program to be offered; projected revenues, expenditures and cash flow; and the operational, management and physical resources of the proposed Branch campus.

(4) After written notice and an opportunity for a written response, the Accreditation Committee shall determine whether any other proposed structural change constitutes the creation of a different law school. If the Accreditation Committee determines that any proposed structural change constitutes the creation of a different law school, it shall recommend to the Council that any acquiescence in the proposed structural change be accompanied by a requirement that the school apply for provisional approval under the provisions of Standard 102 and Rule 4.

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